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2718

No. 13149

United States
Court of Appeals
for the Ninth Circuit.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, Receiver, etc.,

Appellee.

Transcript of Record

Appeals from the United States District Court,
Southern District of California,
Central Division.

FILED

JAN 26 1952

PAUL P. O'BRIEN
CLERK

No. 13149

**United States
Court of Appeals**
for the Ninth Circuit.

D. B. SALISBURY,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

JOSEPH JASPAN,
LEO V. SILVERSTEIN,
210 West 7th St.,
Los Angeles 14, Calif.

In the United States District Court for the
Eastern District of New York

Civil Action No. 11283

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC.;
JAMES ALBERT WIGMORE, PEARL
JOHNSTONE WIGMORE, WESTBURY
FARM & LAND CORPORATION, and WIL-
LIAM E. SHEENE, JR.,

Defendants.

ORDER APPOINTING RECEIVER FOR CA-
NADIAN AMERICAN COMPANY, INC.,
AND JAMES ALBERT WIGMORE

The United States, plaintiff herein, having filed its verified complaint for the foreclosure of Federal tax liens against the defendants Canadian American Company, Inc., and James Albert Wigmore, pursuant to the provisions of Section 3678 of the Internal Revenue Code, and praying for the appointment of a receiver for all of the assets and properties of the defendants Canadian American Company, Inc., and James Albert Wigmore, said receiver to have all the powers of a receiver in equity. The Commissioner of Internal Revenue having filed his certificate pursuant to the provisions of Section 3678(d) of the Internal Revenue Code that the appointment of a receiver having

the powers of a receiver in equity is in the public interest.

This Court having issued a notice to show cause directed to all of the defendants in this complaint as [22*] to why said receiver should not be appointed, and the matter having duly come on to be heard at a term for motions of this Court on the 5th day of December, 1950, and the defendants Canadian American Company, Inc.; James Albert Wigmore, Pearl Johnstone Wigmore and Westbury Farm and Land Corporation having appeared by their attorney, Robert Lee Henry, Esq., and indicating they have no objection to the appointment of a receiver, and the defendant William E. Sheene, Jr., having entered a general appearance by his attorney Sidney O. Raphael, Esq., and likewise indicating that he has no objection to the appointment of said receiver,

Now upon reading and filing the verified petition of the plaintiff herein, and being duly advised of the contents thereof, and having heard the statements of counsel and being duly advised in the premises, the Court finds that the appointment of a receiver having all of the powers of a receiver in equity is necessary and that a receiver should be appointed for the assets, property, debts, equitable interest, rights and things in action, effects and estate, real and personal, of said defendants James Albert Wigmore and Canadian American Company, Inc., it is therefore

Ordered that the petition and motion for the ap-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

pointment of a receiver herein made by the plaintiff United States is granted; and it is hereby further

Ordered that Joseph F. Ruggieri of 16 Court Street, Brooklyn, State of New York, a resident of said State, be and he hereby is appointed receiver of all of the property, debts, equitable interests, rights and things in action, effects and estate, real and personal, of the said defendants Canadian American Company, Inc., and James Albert Wigmore with all the powers of a receiver in equity and it is hereby further [23]

Ordered that said receiver, before entering upon the duties of his trust, execute and acknowledge a bond, with sufficient surety or sureties, to be approved by this Court, to the United States of America, in the penalty of \$25,000.00, conditioned for the faithful discharge of his duties as such receiver and file said bond in the office of the Clerk of this Court, and that upon the filing of this order and the final approval and filing of said bond, as required by law, the said receiver shall be invested with all the rights and powers of a receiver as such, according to the law and practice in such cases made and provided and established; and it is further hereby

Ordered that all of the defendants herein and their officers and directors, agents, employees and attorneys and each of them, be and they hereby are forbidden to make or suffer any transfer, payment, encumbrance or other disposition of or interference with the property, debts, equitable

interests, rights, things in action, effects and estate, real and personal of the said defendants Canadian American Company, Inc., and James Albert Wigmore except in obedience hereto, until further direction in the premises; and it is hereby further

Ordered that the said receiver and any party to this proceeding or any person interested in the property which may be taken into the hands of said receiver may apply at any time on due notice to all parties who have appeared herein to this Court for further or other instructions and for such further power as may be necessary to enable the receiver to carry out properly the terms of this order and fulfill his duties as such receiver; and it is hereby further

Ordered that said receiver deposit all [24] funds of the receivership in the Chemical Bank and Trust Company, 50 Court Street, Brooklyn, New York, in his name as receiver, and no withdrawal shall be made therefrom except by checks countersigned by the surety on his bond. Said depositary shall send monthly statements of the deposits in and withdrawals from said account to the depositor receiver and also to Frank J. Parker, United States Attorney, Brooklyn, New York, attorney for the plaintiff herein, United States of America; and it is hereby further

Ordered that this order shall be without prejudice to any rights, claims, liens or priorities existing against the assets or properties of the defendant, James Albert Wigmore in favor of the defendant William E. Sheene, Jr., and any rights, claims,

liens or priorities which said William E. Sheene, Jr., has or possesses against said assets or properties on this date shall be preserved to the same extent as they now exist without being impaired by virtue of this order or proceedings herein. This Court does not undertake to determine at this time the extent, if any, of said rights, liens, claims or priorities.

Dated this 5th day of December, 1950.

MATTHEW T. ABRUZZO,

United States District Judge.

The entry of the foregoing order is hereby consented to.

Dated December 5, 1950.

ROBERT LEE HENRY,

Attorney for Canadian American Company, Inc.;
James Albert Wigmore, Pearl Johnstone Wigmore, and Westbury Farm and Land Corporation.

SIDNEY O. RAPHAEL,

Attorney for William E.

Sheene, Jr.

A true copy.

[Endorsed]: Filed December 15, 1950. [25]

United States District Court, Eastern
District of New York

Civil No. 11283

[Title of Cause.]

ORDER AUTHORIZING SALE ORANGE
GROVE AVENUE PROPERTY IN CALI-
FORNIA

A motion having duly come on to be heard before me on the 6th day of June, 1951, for an order authorizing the receiver to sell at a judicial sale to be held at a time, place and in a manner to be directed by the United States District Court for the Southern District of California the premises known as 915-955-1003 Orange Grove Avenue, Pasadena, California,

Now on reading and filing the order to show cause dated May 29, 1951, the petition of Joseph F. Ruggieri, receiver herein, duly verified the 28th day of May, 1951, the offer of D. B. Salisbury dated May 21, 1951, and the affidavit of E. Gayle McGuigan duly sworn to on the 6th day of June, 1951, and after hearing Joseph Jaspan for the motion and McGuigan & Kilcullen, Esqs., by E. Gayle McGuigan appearing for James E. Wigmore, Pearl Johnstone Wigmore and other defendants herein and not opposing, it is,

On Motion of Joseph Jaspan, attorney for the receiver,

Ordered, that the motion be and the same hereby is in all respects granted, and it is further

Ordered, that Joseph F. Ruggieri, the receiver

herein, be and he hereby is authorized to offer for sale and is authorized to sell the premises known as 915-955-1003 Orange Grove Avenue, Pasadena, California, [28] more fully described as follows:

Lot 2 of P. C. Baker's Subdivision, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 53, Page 8, of Miscellaneous Records in the office of the County Recorder of said County.

Those portions of the 25.78 acre tract marked Matthews and of the 30 acre tract marked Lockhart and of the parcel marked Reservation 1.14 acre, all in Division E of the San Gabriel Orange Grove Association lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous Records in the office of the County Recorder of said County, and of a portion of W. G. McGregory's Subdivision, as per map recorded in Book 18, Page 44 of Miscellaneous Records in the office of the County Recorder of said County, described as a whole as follows:

Beginning in the west line of Orange Grove Avenue, 100 feet wide, at the northeast corner of land described in deed to John S. Cravens recorded in Book 1232, Page 104 of Deeds, records of said County; thence northerly along the east line of lot 1 of said W. G. McGregory's Subdivision to the northeast corner of said lot in the dividing line between said Matthews and Lockhart Tracts; thence continuing northerly along the west line of Orange Grove

Avenue to a line parallel with and distant 3 feet northerly, measured at right angles from said dividing line; thence westerly parallel with said dividing line, 484 feet; more or less to a line drawn at right angles to said dividing line from a point therein distant westerly 80 feet from the northwest corner of Lot 1 of said W. G. McGregory's Subdivision; thence southerly along said line drawn at right angles 3 feet to a point in said dividing line which point is the northeast corner of land described in deed to Lilly Busch, recorded in Book 2011, Page 211, of said Deed Records; thence along the east line of said land of Busch south $4^{\circ} 15'$, east 163.6 feet, more or less, to the westerly prolongation of the north line of said land described in deed to John S. Cravens first above mentioned; thence easterly along said prolongation and north line 483.5 feet, more or less, to the point of beginning.

That portion of the 25.78 acre tract marked "Matthews" in Division "E" of the San Gabriel Orange Grove Association lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous records, in the office of the County Recorder of said County, described as follows:

Beginning at a point in the west line of Orange Grove Avenue as now established, 100 feet wide, at the southeast corner of the land described as Parcel No. 4 in deed to Ernest F.

Nolting, et ux., recorded in Book 20160, Page 25, Official Records of said County; thence westerly along the southerly line of said land of Nolting to a point in the easterly line of the land described in deed to Louise G. Hill, et al., recorded in Book 9906, Page 289, of said Official Records; thence southerly along said easterly line of said land of Hill to a point in the southerly line of said 25.78 acre Tract; thence easterly along the south line of said 25.78 acre Tract, 42.38 feet; more or less, to the southwest corner of the land described in deed to Arthur H. Fleming, recorded in Book 2392, Page 179, of Deeds, thence north 3 feet to the northwest corner of said land of Fleming, thence easterly parallel with the southerly line of said 25.78 acre Tract, a distance of 483.78 feet, more or less, to a point in the said west line of Orange Grove Avenue; [29] thence northerly along the westerly line of said Avenue 276.46 feet; more or less, to the point of beginning.

and it is further,

Ordered, that the time, manner and place of said sale may be fixed by an order to be entered, without further notice to the parties herein, in the United States District Court for the Southern District of California, and it is further

Ordered, that Joseph F. Ruggieri, the receiver herein, be and he hereby is authorized to execute and deliver all deeds, documents or other instruments which may be necessary to effectuate said

sale, and it is further

Ordered, that the United States District Court for the Southern District of California may enter such order or orders as may be necessary to effectuate said sale.

Dated Brooklyn, New York, June 8th, 1951.

/s/ MATTHEW T. ABRUZZO,
United States District
Judge. [30]

United States of America,
Eastern District of New York—ss.

I, Percy G. B. Gilkes, Clerk of the United States District Court in and for the Eastern District of New York, do hereby certify that the annexed and foregoing is a true and full copy of the original order of Judge Matthew T. Abruzzo, signed June 8, 1951, in Civil Action 11283, U.S.A. vs. Canadian American Co., Inc., et al., authorizing sale of Orange Grove Avenue property in California; now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the afore-said Court at Brooklyn, N. Y., this 14th day of June, A.D. 1951.

[Seal] /s/ PERCY G. B. GILKES,

By /s/ JAMES R. ABRAM,
Deputy Clerk.

[Endorsed]: Filed July 6, 1951. [31]

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 12,703-BH

In the Matter of the Action Commenced in the
United States District Court for the Eastern
District of New York, Entitled

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC.,
et al.,

Defendants.

ORDER FOR SALE OF REAL PROPERTY
BY RECEIVER AT PUBLIC SALE

Upon the annexed petition of Joseph F. Ruggieri,
Receiver herein, and upon the exhibits attached
thereto, and the orders of the United States District
Court for the Eastern District of New York, it is

Ordered that Joseph F. Ruggieri, as Receiver
appointed in the action entitled "In the Matter of
the Action Commenced in the United States District
Court for the Eastern District of New York,
Entitled United States of America, Plaintiff, vs.
Canadian American Company, Inc., et al., Defend-
ants"—sell, at public auction, to the highest bidder
or bidders, in Court Room No. 6 in the United
States Post Office and Court House Building, at
Los Angeles, California, on Monday, the 13th day

of August, 1951, at the hour of ten o'clock a.m., Pacific Daylight Savings Time—all of said Receiver's right, title and interest in and to the premises commonly known as 915-955-1003 [32] Orange Grove Avenue, Pasadena, California, and more particularly described in said annexed petition of Joseph Ruggieri, Receiver herein, and the "Notice of Sale" hereinafter referred to; and it is further

Ordered that the offer of D. B. Salisbury to purchase said property, referred to in said Receiver's petition, be considered at said time; and it is further

Ordered that this Court will consider such other and further business as may properly come before the Court at said time in connection with such sale; and it is further

Ordered that Eldred L. Meyer be and he hereby is appointed to appraise the value of said property and report same to this Court forthwith, for which he shall receive a compensation of no more than \$25.00 per diem; and it is further

Ordered that notice of this sale be mailed within ten (10) days from the date of this Order to all parties who have appeared in this proceeding in this District, and to the Attorney General of the State of California, the County Counsel of the County of Los Angeles, California, and the City Attorney of the City of Pasadena, California; and it is further

Ordered that a copy of said notice of sale be published in the Los Angeles Daily Journal, a newspaper regularly published in the County of Los

Angeles, California, once a week for four consecutive weeks commencing on July 13, 1951; and it is further

Ordered that said notice shall be substantially in the form and content of the notice hereto annexed, which this Court hereby approves; and it is further

Ordered that in the conduct of such sale the Receiver may pay real estate brokerage commission in accordance with the probate rules prevalent in this District which provide for the payment of the full commissions of five per cent to the broker producing the initial [33] bid if it shall become the successful bid, and providing for the payment of only one-half commissions to the broker securing the initial bid if some other higher bid shall be accepted, and further providing that the broker producing a successful bid other than the original bid shall also be entitled to one-half of the commissions.

Dated at Los Angeles, California, this 12th day of July, 1951.

/s/ BEN. HARRISON,
United States District
Judge. [34]

[Title of District Court and Cause.]

PETITION FOR ORDER AUTHORIZING
SALE OF REAL ESTATE

Comes now Joseph F. Ruggieri, Receiver in the action entitled United States of America against

Canadian American Company, Inc., et al., by and through his attorney, Joseph Jaspan, alleges and represents to the Court as follows:

I.

That by an order dated December 5, 1950, made and entered in the United States District Court for the Eastern District of New York, petitioner was appointed Receiver of the assets and property of James Albert Wigmore and Canadian American Company, Inc.

II.

That by order dated February 9, 1951, the receivership was extended and petitioner was also appointed Receiver of the assets of National Munitions Company of Eldred, Pennsylvania. [39]

III.

Pursuant to Title 28, U.S.C., Section 754, copies of the aforementioned orders and the complaints in said action were filed with the Clerk of the United States District Court for the Southern District of California.

IV.

That on December 5, 1950, Wagner Realty Company was the owner of the property known as 915-955-1003 Orange Grove Avenue, Pasadena, California, which property is more fully described in the attached exhibit.

That petitioner became the owner of the outstanding issued stock of Wagner Realty Company on December 5, 1950.

That by resolution of Wagner Realty Company

said property was conveyed to and title was vested in Joseph F. Ruggieri as Receiver by grant deed duly recorded in the Office of the County Recorder of Los Angeles County on March 1, 1951.

V.

That by order entered in the United States District Court for the Eastern District of New York, the Receiver was authorized to sell and convey said property to the highest bidder at a judicial sale, the time, place and manner of which are to be fixed by an order of the United States District Court for the Southern District of California.

VI.

That the Receiver herein has obtained an offer of \$60,100.00 from D. B. Salisbury of 1235 Crescent Heights Boulevard, Los Angeles, California, for said property, consisting of approximately 8 acres upon which there is presently one structure—a copy of said offer being hereto attached as an exhibit.

VIII.

That said offer is conditioned upon approval of the Court and subject to further bidding at a public judicial sale. [40]

IX.

That said offer was produced by the William Wilson Company of 40 North Garfield Avenue, Pasadena, California, licensed real estate brokers.

That the Receiver has agreed, subject to the approval of the Court, to pay the usual commission of five per cent in the event the bid of Mr. Salisbury

in the original amount or in any increased amount is accepted by this Court. The Receiver has further agreed to abide by the local probate rules covering the payment of commissions in the event that some other and higher offer is accepted.

X.

The Receiver respectfully prays that a public sale be held in the Court at which the bid of Mr. D. B. Salisbury may be considered and such other and further bids as may be made for said property may likewise be considered.

Wherefore, petitioner as Receiver respectfully prays that the property described in the attached exhibits be sold at public judicial sale in the United States District Court for the Southern District of California in accordance with the terms of the attached order.

Dated this 18th day of June, 1951.

/s/ JOSEPH JASPAN,

Attorney for Receiver. [41]

EXHIBIT

Description of Real Property Referred to in Paragraph IV of the Foregoing Petition

Parcel 1. Lot 2 of P. C. Baker's Subdivision, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 53, Page 8, of Miscellaneous Records in the office of the County Recorder of said County.

Parcel 2. Those portions of the 25.78 acre tract

marked Matthews and of the 30 acre tract marked Lockhart and of the parcel marked Reservation 1.14 acres, all in Division E of the San Gabriel Orange Grove Association lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous Records in the office of the County Recorder of said County, and of a portion of W. G. McGregory's Subdivision, as per map recorded in Book 18, Page 44, of Miscellaneous Records in the office of the County Recorder of said County, described as a whole as follows:

Beginning in the west line of Orange Grove Avenue, 100 feet wide, at the northeast corner of land described in deed to John S. Cravens recorded in Book 1232, Page 104, of Deeds, Records of said County; thence northerly along the east line of Lot 1 of said W. G. McGregory's Subdivision to the northeast corner of said lot in the dividing line between said Matthews and Lockhart Tracts; thence continuing northerly along the west line of Orange Grove Avenue to a line parallel with and distant 3 feet northerly, measured at right angles, from said dividing line; thence westerly parallel with said dividing line, 484 feet, more or less, to a line drawn at right angles to said dividing line from a point therein distant westerly 80 feet from the northwest corner of Lot 1 of said W. G. McGregory's Subdivision; thence southerly along said line drawn at right angles 3 feet to a point in said dividing line, which point is the north-

east corner of land described in deed to Lilly Busch, recorded in Book 2011, Page 211, of said Deed Records; thence along the east line of said Busch, south $4^{\circ} 15'$, east 163.6 feet, more or less, to the westerly prolongation of the north line of said land described in deed to John S. Cravens first above mentioned; thence easterly along said prolongation and north line 483.5 feet, more or less, to the point of beginning.

Parcel 3. That portion of the 25.78 acre tract marked "Matthews" in Division "E" of the San Gabriel Orange Grove Association Lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous Records, in the office of the County Recorder of said County, described as follows:

Beginning at a point in the west line of Orange Grove Avenue as now established, 100 feet wide, at the southeast corner of the land described as Parcel No. 4 in deed to Ernest F. Nolting, et ux., recorded in Book 20160, Page 25, Official Records of said County; thence westerly along the southerly line of said land of Nolting to a point in the easterly line of the land described in deed to Louise G. Hill, et al., recorded in [42] Book 9906, Page 289, of said Official Records; thence southerly along said easterly line of said land of Hill to a point in the southerly line of said 25.78 acre tract; thence easterly along the south line of said

25.78 acre tract, 42.38 feet, more or less, to the southwest corner of the land described in deed to Arthur H. Fleming, recorded in Book 2392, Page 179, of Deeds; thence north 3 feet to the northwest corner of said land of Fleming; thence easterly parallel with the southerly line of said 25.78 acre tract, a distance of 483.78 feet, more or less, to a point in the said west line of Orange Grove Avenue; then northerly along the westerly line of said avenue 276.46 feet, more or less, to the point of [43] beginning.

EXHIBIT

Offer Referred to in Paragraph VI of
Foregoing Petition

Pasadena, California,
May 21, 1951.

Mr. Joseph F. Ruggieri, Receiver,
c/o Hotel Ambassador,
Los Angeles, California.

Dear Sir:

We hereby offer to purchase the following described property in the City of Pasadena, County of Los Angeles, State of California, and described as follows:

Parcel 1: Lot 2 of P. C. Baker's Subdivision, 126.46 x 700, inc. all improvements thereon, otherwise known as 915 S. Orange Grove.

Parcel 2: That portion of division E,

S.G.O.G. Asso. Lands, to the So. of Parcel 1; 278.07 x 493.58 (North side) x 276.97 (rear) x 526.16 (South).

Parcel 3: No. 163' of Lot 1, W. G. McGregory's Subdivision, also Lot com. at N/E cor. of Lot 1, W. G. McGregory's Sub., thence N. 3' x 483.65' deep W., also lot commencing at N/W cor. Lot 1, W. G. McGregory's sub., thence W. 80', thence S. 163.2', thence E. 52.8' to N. line of said Lot 1, thence N. on said line to beginning, being a portion of Div. E, S.G.O.G. Asso. Lands.

Subject to any state of facts an accurate survey may show.

Free and clear of all encumbrances except:

(a) General and Special City and County Taxes of the fiscal year 1951-1952.

(b) Covenants, conditions, restrictions, reservations and easements of record and approved zoning regulations.

For the sum of Sixty Thousand, One Hundred Ten (\$60,110.00) Dollars cash, payable as follows:

Check of The William Wilson Company for Six Thousand, One Hundred (\$6,100.00) Dollars payable to your order and the balance on or before ten (10) days from date of confirmation of sale.

This offer is made subject to the conveyance of good and sufficient title, seller to furnish customary policy of title insurance at a liability of \$60,110.00,

showing property free and clear of all encumbrances excepting general and special City and County taxes of the fiscal year 1951-1952 and conditions and restrictions of record, if any, as above provided.

Taxes of the fiscal year 1951-1952 to be prorated and paid by the buyer from date of confirmation of sale.

It is understood that this property is owned by Joseph F. Ruggieri, Receiver, in the Matter of the United States of America vs. Canadian [44] American Co., Inc., et al., and that the completion of this purchase is subject to the confirmation by the appropriate United States District Court, it being understood that you will take all necessary legal steps immediately to procure confirmation of sale at the earliest possible date.

It is further agreed that in the event the title is not delivered to us by reason of failure of the Court to approve or by reason of the fact that some other purchaser shall have made a higher bid at a judicial sale or in accordance with the terms of any Court order, or by reason of the unmarketable title, the obligation of the Receiver hereunder, or of the Offeror hereunder, shall both be cancelable and both shall be discharged of any liability on their part upon the return of the deposit made hereunder.

Seller to furnish a contour survey by a licensed surveyor at his expense.

If this offer is accepted, we shall take title in the names of D. B. Salisbury and Verne Salisbury, his wife, as joint tenants.

It is a part of this offer that the completion of

this sale and the delivery of the Title Policy of the subject property hereunder shall be completed on or before July 31st, 1951, or the deposit funds be returned to the offeror.

Yours very truly,

D. B. SALISBURY.

[Endorsed]: Filed July 12, 1951. [45]

[Title of District Court and Cause.]

NOTICE OF SALE

Notice Is Hereby given that pursuant to an Order entered by the District Court of the United States in and for the Southern District of California, Central Division, dated July 12, 1951, in a cause pending in said Court entitled "In the Matter of the Action Commenced in the United States District Court for the Eastern District of New York, Entitled: United States of America, Plaintiff, vs. Canadian American Company, Inc., et al., Defendants"—Civil #12,703-BH—I, Joseph F. Ruggieri, as the Receiver appointed in said action, will sell at public auction to the highest bidder or bidders, in Courtroom No. 6 in the United States Post Office and Court House Building, Los Angeles, California, on Monday, the 13th day of August, 1951, at the hour of ten o'clock a.m., Pacific Daylight Savings Time, all of the undersigned Receiver's right, title

and interest in and to the premises commonly known as 915-955-1003 [46] Orange Grove Avenue, Pasadena, California, and more particularly described as follows, to wit:

Parcel 1. Lot 2 of P. C. Baker's Subdivision, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 53, Page 8, of Miscellaneous Records in the office of the County Recorder of said County.

Parcel 2. Those portions of the 25.78 acre tract marked Matthews and of the 30 acre tract marked Lockhart and of the parcel marked Reservation 1.14 acres, all in Division E of the San Gabriel Orange Grove Association lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous Records in the office of the County Recorder of said County, and of a portion of W. G. McGregory's Subdivision, as per map recorded in Book 18, Page 44, of Miscellaneous Records in the office of the County Recorder of said County, described as a whole as follows:

Beginning in the west line of Orange Grove Avenue, 100 feet wide, at the northeast corner of land described in deed to John S. Cravens recorded in Book 1232, Page 104, of Deeds, Records of said County; thence northerly along the east line of Lot 1 of said W. G. McGregory's Subdivision to the northeast corner of said lot in the dividing line between said Matthews and Lockhart Tracts; thence continuing northerly along the west line of

Orange Grove Avenue to a line parallel with and distant 3 feet northerly, measured at right angles, from said dividing line; thence westerly parallel with said dividing line, 484 feet, more or less, to a line drawn at right angles to said dividing line from a point therein distant westerly [47] 80 feet from the northwest corner of Lot 1 of said W. G. McGregory's Subdivision; thence southerly along said line drawn at right angles 3 feet to a point in said dividing line which point is the northeast corner of land described in deed to Lilly Busch, recorded in Book 2011, Page 211, of said Deed Records; thence along the east line of said land of Busch south $4^{\circ} 15'$ east 163.6 feet, more or less, to the westerly prolongation of the north line of said land described in deed to John S. Cravens first above mentioned; thence easterly along said prolongation and north line 483.5 feet, more or less, to the point of beginning.

Parcel 3. That portion of the 25.78 acre tract marked "Matthews" in Division "E" of the San Gabriel Orange Grove Association Lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous Records, in the office of the County Recorder of said County, described as follows:

Beginning at a point in the west line of Orange Grove Avenue as now established, 100 feet wide, at the southeast corner of the land described as Parcel No. 4 in deed to Ernest F. Nolting, et ux., recorded in Book 20160, Page 25, Official Records of said

County; thence westerly along the southerly line of said land of Nolting to a point in the easterly line of the land described in deed to Louise G. Hill, et al., recorded in Book 9906, Page 289, of said Official Records; thence southerly along said easterly line of said land of Hill to a point in the southerly line of said 25.78 acre tract; thence easterly along the south line of said 25.78 acre tract, 42.38 feet, more or less, to the southwest corner of the land described in deed to Arthur H. Fleming, recorded in Book 2392, Page 179, of Deeds; thence north 3 feet to the northwest corner of said land of Fleming; thence easterly parallel with [48] the southerly line of said 25.78 acre tract, a distance of 483.78 feet, more or less, to a point in the said west line of Orange Grove Avenue; thence northerly along the westerly line of said avenue 276.46 feet, more or less, to the point of beginning.

Said parcels will be offered as an entirety and not separately.

Notice Is Further Given that D. B. Salisbury has offered to purchase said real property and pay therefor the sum of \$60,110.00, all as more particularly set forth in the Petition of this Receiver filed in said proceeding on July 12, 1951.

For further particulars concerning the said Salisbury's offer, the terms of the sale, and the terms and provisions of the Order of the United States District Court in and for the Southern District of California, Central Division, intending purchasers are hereby referred to the Petition of the Receiver

on file in said proceeding and the Order entered therein dated July 12, 1951.

Dated at Los Angeles, California, this 12th day of July, 1951.

JOSEPH F. RUGGIERI,
Receiver.

By /s/ LEO V. SILVERSTEIN,
One of His Attorneys.

[Endorsed]: Filed July 20, 1951. [49]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL OF
NOTICE OF SALE

Leo V. Silverstein, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business address is 210 West Seventh Street, Los Angeles 14, California; that on the 20th day of July, 1951, affiant served the within "Notice of Sale" on the United States of America, State of California, County of Los Angeles, California; City of Pasadena, California, and Joseph F. Ruggieri, as Receiver in said action, [50] by placing a true copy thereof in an envelope addressed to each, as follows:

(1) United States of America, by mailing

to Mr. Ernest A. Tolin, United States Attorney, 600 Federal Building, Los Angeles 12, California. Attention Mr. Eugene Harpole, Special Attorney.

(2) State of California, by mailing to Mr. Edmund G. Brown, Attorney General of the State of California, 600 State Building, 217 W. First Street, Los Angeles 12, California. Attention Mr. Edward Sumner.

(3) County of Los Angeles, by mailing to Mr. Harold W. Kennedy, County Counsel of the County of Los Angeles, 1100 Hall of Records, Los Angeles 12, California. Attention Mr. Andrew O. Porter.

(4) City of Pasadena, California, by mailing to Mr. H. Burton Noble, City Attorney of the City of Pasadena, Room 202, City Hall, Pasadena 1, California. Attention Mr. Robert E. Michalski.

(5) Mr. Joseph F. Ruggieri, Receiver, c/o Mr. Joseph Jaspán, Counselor at Law, 16 Court Street, Brooklyn 2, New York.

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made; that there is delivery service by United States mail at the places so addressed and/or there is a regular

communication by mail between the place of mailing and the places so addressed; [51]

That the foregoing are all of the parties who have appeared in this proceeding in this District.

/s/ LEO V. SILVERSTEIN.

Subscribed and sworn to before me this 20th day of July, 1951.

[Seal] /s/ MARIE TREAIS,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed July 20, 1951. [52]

United States District Court, Southern District
of California, Central Division

[Title of Cause.]

MINUTES OF THE COURT

August 13, 1951

Present: The Honorable James M. Carter,
District Judge.

Nature of Proceedings

(1) Public auction, to sell to the highest bidder, of all of the right, title and interest of Jos. F. Ruggeri, Receiver, in and to the premises commonly known as 915-955-1003 Orange Grove Ave., Pasadena, Calif.; pursuant to order of July 12, 1951, and notice of sale;

(2) Consideration of the offer of D. B. Salisbury to purchase said property;

(3) Hearing such other and further business as may properly come before the Court in connection with such sale.

Court makes a statement and announces it will now receive any bids over the bid of D. B. Salisbury in amount of \$60,110.

No other bid is made, and

Ruling

It is ordered that said property be sold to D. B. Salisbury for the sum of \$60,110; counsel for Receiver to prepare and present written order thereon.

EDMUND L. SMITH,
Clerk. [54]

[Title of District Court and Cause.]

ORDER SETTING TIME FOR HEARING ON MOTION TO VACATE MINUTE ORDER AND FIXING NOTICE OF HEARING

On reading the annexed motion and good cause appearing therefor,

It Is Hereby Ordered:

1. That the hearing on said motion be and the same is hereby set for and will be heard on the 22nd day of August, 1951, at the hour of 10 o'clock a.m., Pacific Daylight Savings Time, in Court Room No. 3, before Honorable James M. Carter, United States District Court Judge.

2. It Is Further Ordered that the time for giving notice of such hearing shall be and it is hereby shortened so that the same may be given by serving a copy of the annexed motion and a copy of this order, by depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, on or before the hour of 5 o'clock p.m., on August 17th, 1951, to each of the following, to wit: [55]

D. B. Salisbury, 1235 Crescent Heights Blvd.,
Los Angeles, California.

United States of America, by mailing to Mr.
Ernest A. Tolin, United States Attorney, 600
Federal Building, Los Angeles 12, California;
attention Mr. Eugene Harpole, Special Attor-
ney.

State of California, by mailing to Mr. Ed-
mund G. Brown, Attorney General of the State
of California, 217 West First Street, Los
Angeles 12, California.

County of Los Angeles, by mailing to Mr.
Harold W. Kennedy, County Counsel of the
County of Los Angeles, 1100 Hall of Records,
Los Angeles 12, California.

City of Pasadena, by mailing to Mr. H.
Burton Noble, City Attorney of the City of
Pasadena, Room 202, City Hall, Pasadena, Cali-
fornia.

Mr. Joseph F. Ruggieri, Receiver, c/o Mr.
Joseph Jaspan, Counselor at Law, 16 Court
Street, Brooklyn 2, New York.

That service aforesaid shall constitute and be service of the notice of hearing on said motion.

Dated August 16, 1951.

/s/ JAMES M. CARTER,
United States District
Judge. [56]

[Title of District Court and Cause.]

MOTION TO VACATE AND SET ASIDE
MINUTE ORDER AUTHORIZING RE-
CEIVER'S SALE OF REAL PROPERTY
AND FOR FURTHER PROCEEDINGS RE
SALE

Now comes Joseph F. Ruggieri, Receiver in the action entitled United States of America against Canadian American Company, Inc., et al., by and through his attorney, Joseph Jaspan, and moves the court to vacate and set aside the sale and any minute order made in connection therewith by the Honorable James M. Carter, Judge of the United States District Court, on August 13, 1951, by this moving Receiver to D. B. Salisbury of the real property described in the petition for order authorizing sale of real property filed by this moving party in this court, dated July 12, 1951, for the following reasons and upon the following grounds:

First Ground

1. That because of mistake, inadvertence, surprise and excusable neglect the Receiver herein was

deprived of giving [57] consideration to and acting upon an offer to purchase said property by one, Theodore J. Ticktin, at a price of approximately one-third more than the bid of said D. B. Salisbury, to wit, the sum of \$80,000.00;

That your Receiver is informed and believes and upon such information and belief alleges that one, Theodore J. Ticktin, a financially responsible person, first learned of the proposed sale of the premises known as 915-955, 1003 Orange Grove Avenue, Pasadena, California, being the property referred to in this motion, on the morning of August 13, 1951; that said Ticktin was familiar with the location of said property and knew the value thereof and that immediately upon his learning of the proposed sale thereof and prior to the making of the minute order herein referred to, said Ticktin decided to make a bid or such bids as might be necessary to acquire said property at a purchase price up to \$80,000.00;

That said Ticktin attempted to communicate with counsel for this Receiver to tender such bid and did communicate with the secretary of Honorable James M. Carter, before whom said sale proceedings had been set, but that said Ticktin was unable to communicate his said intention to bid at such sale to either your Receiver, his counsel or the Court before whom the proceedings on such sale were then pending;

That had your Receiver had knowledge of the desire and intention of said Ticktin to make a bid for said property, he would have requested that the

proceedings on such sale be postponed to a time later in the day of said August 13, 1951, or to such other appropriate time as would have enabled said Ticktin to appear in Court and make his said bid;

That after the making of the minute order herein referred to, said Ticktin communicated with Leo V. Silverstein, Esq., one of the counsel of this Receiver, and advised him of the facts herein set forth; [58]

That thereafter and on Wednesday, August 15, 1951, this Receiver received from said Ticktin his offer to purchase said real property for the sum of \$80,000.00; that a copy of his offer is attached hereto, marked Exhibit "1"; that there was deposited with your Receiver the sum of \$10,000.00 referred to in said offer, which your Receiver now retains;

That relief should be given to this Receiver because of his mistake, inadvertence, surprise, excusable neglect, newly discovered facts and for other reasons justifying relief, pursuant to Rule 60 of the Rules of Civil Procedure of this Court; that said minute order should be set aside and appropriate orders and proceedings should be ordered and taken herein so as to enable this Receiver to accept the bid of said Theodore J. Ticktin herein referred to, or any bid in excess of said sum of \$80,000.00.

Second Ground

2. As a further, separate and second ground, this Receiver alleges:

Adopts and re-alleges the averments and allega-

tions set forth in his first ground herein as though fully set forth again herein;

That the price at which said real property was authorized to be sold to D. B. Salisbury was grossly inadequate and grossly disproportionate to the market value of said real property, as is shown by the bid of said Theodore J. Ticktin herein referred to;

That it would be unfair, unjust and inequitable and for this reason alone the minute order herein referred to should be vacated and set aside and further appropriate orders and proceedings should be made and taken in this proceeding so that this Receiver may obtain a just and adequate price for said real property.

This motion is based upon the records and files of this proceeding, which are by this reference made a part hereof, the affidavit of Theodore J. Ticktin filed herewith, the notice of [59] hearing of this motion and all other records and evidence which may properly be considered at the time of the hearing of this motion, including the prior order authorizing the sale of this property and payment of real estate broker's commissions.

/s/ JOSEPH JASPAN,

Attorney for Joseph F.
Ruggieri, Receiver.

Points and Authorities

The motion should be granted.

Vol. 8, *Cyclopedia of Federal Procedure*,
Second Edition, Sections 3588 to 3593;

Blackburn v. Selma R. Co.,
3 Fed. 689;
Baltimore Trust Co. v. Interocean Oil Co.,
29 Fed. Supp. 269;
American Trading & Production Corp. v.
Connor, 109 Fed. (2d) 871;
Van Senden v. O'Brien,
58 Fed. (2d) 689;
Klapprott v. United States of America,
335 U.S. 601; 93 L. Ed. 266, at p. 277, un-
der paragraph "Fourth";
Rule 60, Federal Rules of Civil [60] Pro-
cedure.

EXHIBIT No. 1

August 15, 1951.

The undersigned, Theodore J. Ticktin, of 5226 Lynwood Drive, Los Angeles, California, does hereby offer the sum of \$80,000.00 for the property known as 915-955, 1003 Orange Grove Avenue, Pasadena, California, more fully described in petition filed with the United States District Court in the matter of the United States of America against Canadian American Company, Inc.

This offer is made subject to the approval of the court and with full knowledge that a prior sale has already been conducted. The undersigned does hereby tender, as a deposit against said purchase, the sum of \$10,000.00 by cashier's check and agrees to pay the balance of the purchase price within thirty days after acceptance of his offer and approval by the Federal Court. The undersigned has

examined the property and agrees that no representations have been made by the Receiver as to the condition of the property or the uses to which it may be put.

The buyer represents that one broker brought about this offer and that the broker will be limited in his claim for commission to 2½%, it being understood that the claim to the other 2½% may be made by the William Wilson Company, who produced the original bid. The undersigned agrees to hold the Receiver harmless from all claims by any broker for more than 2½% commission. No commission shall be payable if this offer or any increased offer by this purchaser is not accepted and approved.

Title is to be delivered free and clear of all liens, taxes, except 1951-1952 city and county taxes. The property shall be delivered, however, subject to existing local zoning regulations, covenants and restrictions of record. Owner's policy of title insurance to be furnished by seller.

/s/ THEODORE J. TICKTIN. [61]

[Title of District Court and Cause.]

AFFIDAVIT OF THEODORE J. TICKTIN

State of California,
County of Los Angeles—ss.

Theodore J. Ticktin, being duly sworn, deposes and says:

That he lives at 5226 Linwood Drive, Los Angeles, California;

That he first learned of the proposed sale of the

premises known as 915-955, 1003 Orange Grove Avenue, Pasadena, California, on the morning of August 13, 1951; that he was familiar with the location of the property and knew the value thereof; that upon learning of the offer of this property for sale, deponent did then and there immediately decide to make a bid, or such bids as may be necessary to acquire the property;

That deponent did learn, however, by examining the advertisement that the bids were to be made in the Federal Court at 10:00 a.m. [62] on that morning and that it would be impossible for him to leave his home and arrive at the Court House by the time specified; that deponent did therefore call the Court House and spoke to a young lady who identified herself to be secretary for Judge James M. Carter, before whom the proceeding was pending; that deponent asked the young lady to advise the Court that he would like to make a bid at the present time or if that were not possible to have the hearing recessed for a sufficient length of time so that he could come down to the court and make the bid or bids in person; that deponent was advised that the Judge had just gone on the bench and that she could not communicate either with the Judge or with Mr. Silverstein, who apparently was in the Courtroom; that deponent has since been advised that the young lady did call the office of Mr. Silverstein and advise him of his call, but Mr. Silverstein was not available at that time as he was attending the hearing in court.

That deponent was prepared to bid up to

\$80,000.00 for this property and is still willing to make that offer; that deponent has tendered a written offer in that sum to the receiver, accompanied by a check for \$10,000.00, and asks this court to either consider his bid of \$80,000.00 or order a new sale, at which he may make an initial bid of \$80,000.00.

That, in the opinion of deponent, he was prevented from making the bid by circumstances beyond his control and believes that the Court should grant him the equitable relief herein sought.

/s/ THEODORE J. TICKTIN.

Subscribed and sworn to before me this 15th day of August, 1951.

[Seal] /s/ ESTHER DONNELLAN,

Notary Public in and for Said
County and State.

My Commission expires July 10, 1954.

[Endorsed]: Filed August 16, 1951. [63]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL OF MOTION TO VACATE AND SET ASIDE MINUTE ORDER AUTHORIZING RECEIVER'S SALE OF REAL PROPERTY AND FOR FURTHER PROCEEDINGS RE SALE AND ORDER SETTING TIME FOR HEARING AND FIXING NOTICE OF HEARING

State of California,
County of Los Angeles—ss.

Evelyn Lillie, being first duly sworn, deposes and says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business address is: 210 West Seventh Street, Los Angeles 14, California; that on the 17th day of August, 1951, before the hour of 5:00 o'clock p.m. affiant served copies of Motion to Vacate and Set Aside Minute Order Authorizing Receiver's Sale of Real Property and for Further Proceedings Re Sale and Order Setting Time for Hearing on Motion to Vacate Minute Order and Fixing Notice of Hearing on each of the following, to wit:

D. B. Salisbury, 1235 Crescent Heights Blvd.,
Los Angeles, [64] California;

United States of America, by mailing to Mr. Ernest A. Tolin, United States Attorney, 600 Federal Building, Los Angeles 12, California, attention, Mr. Eugene Harpole, Special Attorney;

State of California, by mailing to Mr. Edmund G. Brown, Attorney General of the State of California, 217 West First Street, Los Angeles, California;

County of Los Angeles, by mailing to Mr. Harold W. Kennedy, County Counsel of the County of Los Angeles, 1100 Hall of Records, Los Angeles 12, California;

City of Pasadena, by mailing to Mr. H. Burton Noble, City Attorney of the City of Pasadena, Room 202 City Hall, Pasadena 1, California;

Mr. Joseph F. Ruggieri, Receiver, c/o Mr. Joseph Jaspán, Counselor at Law, 16 Court Street, Brooklyn 2, New York,

by placing true copies thereof in envelopes addressed to each as above set forth, and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made; that there is delivery service by United States Mail at the places so addressed and/or there is a regular communica-

tion by mail between the place of mailing and the places to addressed.

/s/ EVELYN LILLIE.

Subscribed and sworn to before me this 20th day of August, 1951.

[Seal] /s/ JUNE BISHOP,

Notary Public in and for Said
County and State.

[Endorsed]: Filed August 21, 1951. [65]

[Title of District Court and Cause.]

RECEIVER'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
HIS MOTION TO VACATE AND SET
ASIDE MINUTE ORDER AUTHORIZING
SALE OF REAL PROPERTY

Permission of the court having heretofore been obtained herein, the Receiver submits the following points and authorities in support of his motion to vacate and set aside minute order authorizing sale of real property, said motion having been set for hearing on August 22, 1951, before Honorable James M. Carter, and at said time continued for hearing to August 27, 1951, at the hour of 11:00 o'clock a.m.

The order made on August 13, 1951, in this proceeding was a discretionary order, not a final decision, and may be vacated and set aside.

Vol. 8 Cyclopedia of Federal Procedure,
Second Edition, Sections 3588 to 3593;

Subdivision (b) of Rule 54, of Federal Rules
of Civil Procedure; [66]

United States v. Otley, et al.,

116 Fed. 2d 958;

Blackburn v. Selma R. Co.,

3 Fed. 689;

Baltimore Trust Co. v. Interocean Oil Co.,

29 Fed. Supp. 269;

American Trading & Production Corp. v.

Connor, 109 Fed. (2d) 871;

Van Senden v. O'Brien,

58 Fed. (2d) 689;

The proceedings of August 13, 1951, should be
vacated on the grounds and for the reasons set forth
in Subdivision (b) of Section 60 of the Federal
Rules of Civil Procedure.

Rule 60, Federal Rules of Civil Procedure;

Klapprott v. United States of America,

335 U.S. 601; 93 L.Ed. 266, at p. 277, under
paragraph "Fourth."

Respectfully submitted,

JOSEPH JASPAN,

By /s/ LEO V. SILVERSTEIN,

Attorney for Receiver.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 24, 1951. [67]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF
RECEIVER'S MOTION

State of California,
County of Los Angeles—ss.

Leo V. Silverstein, being first duly sworn, deposes and says:

That affiant is one of the attorneys for the Receiver herein;

That affiant is informed and believes and upon such information and belief avers that on August 16, 1951, three days after the proceedings had in this court with reference to the sale of the property known as 915-955, 1003 Orange Grove Avenue, Pasadena, California, D. B. Salisbury filed with Title Insurance & Trust Company certain escrow instructions in escrow No. 3499383 in which said Salisbury signed a statement in which he said, among other things: "The closing of this escrow is contingent upon the seller obtaining [71] the necessary order confirming sale."

/s/ LEO V. SILVERSTEIN.

Subscribed and sworn to before me this 27th day of August, 1951.

[Seal] /s/ MARIE TREAIS,

Notary Public in and for Said
County and State.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 27, 1951. [72]

United States District Court, Southern District of
California, Central Division

[Title of Cause.]

MINUTES OF THE COURT

August 30, 1951

Present: The Honorable James M. Carter,
District Judge.

Nature of Proceedings

Court renders oral decision on motion of Receiver, heretofore taken under submission, to vacate and set aside sale and minute order of 8/13/51, and

Ruling

It is ordered that said motion is granted upon certain conditions; counsel for Receiver to prepare and present written order thereon forthwith.

EDMUND L. SMITH,
Clerk. [74]

[Title of District Court and Cause.]

ORDER ON MOTION OF RECEIVER TO VACATE MINUTE ORDER

The motion of Joseph F. Ruggieri, Receiver herein, to vacate and set aside minute order authorizing Receiver's sale of real property having come on regularly for hearing on August 22, 1951, and

having been duly considered, the Court makes the following Order:

It Is Hereby Ordered

(1) That the minute order in the proceedings for the sale of real property heretofore made in this proceeding on August 13, 1951, be and the same is hereby vacated and set aside and declared to be of no force or effect;

(2) That the Receiver sell said property at public auction in the manner provided by law on proceedings hereafter regularly to be taken herein and that the offer of Theodore J. Ticktin to purchase said property for the sum of \$80,000.00 be considered at such [75] sale;

(3) That this Order is conditioned upon the depositing with said Receiver by said Theodore J. Ticktin on or before September 4th, 1951, at 5 p.m., the additional sum of \$10,000.00, so that said Receiver shall have on hand from said Ticktin as a good faith deposit on his said bid the sum of \$20,000.00, which shall be retained by said Receiver should the said Ticktin fail to bid at the time of such sale of said property a sum of \$80,000.00 or more or, in lieu of the depositing of said additional sum of \$10,000.00, said Ticktin shall deposit with said Receiver a good and sufficient undertaking in form and with sureties approved by this Court, in the sum of \$80,000.00, conditioned that said Ticktin and the Sureties on said undertaking shall be firmly bound to the Receiver in a sum equal to

the difference between \$80,000.00 and the purchase price received by said Receiver at such sale;

(4) That the Receiver shall pay to The William Wilson Company, out of the proceeds of said sale, the sum of \$3,000.00, as payment in full of its real estate broker's commission for services rendered in connection with the sale of said real property;

(5) That the Receiver shall return to D. B. Salisbury the sum of \$6,100.00, heretofore deposited with the Receiver by said Salisbury, and from the proceeds of the sale of said property pay to said D. B. Salisbury the additional sum of \$500.00 as counsel fees for the counsel of said D. B. Salisbury for services rendered in this matter since August 13th, 1951, and such reasonable escrow expenses as may have been incurred by said D. B. Salisbury since August 13, 1951, in a sum not exceeding \$150.00.

Dated this 31st day of August, 1951.

/s/ JAMES M. CARTER,

United States District Judge.

[Endorsed]: Filed August 31, 1951. [76]

[Title of District Court and Cause.]

REPORT OF APPRAISER

The undersigned duly appointed, qualified, and acting Inheritance Tax Appraiser for the State of

California, having been appointed to appraise the subject real property in the above-entitled action pursuant to order dated July 12, 1951, submits his report as follows:

The undersigned Appraiser has viewed and appraised the real property described as follows:

Parcel 1, Lot 2 of P. C. Baker's Subdivision in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 53, Page 8 of Miscellaneous Records in the office of the County Recorder of said County. [77]

Parcel 2. Those portions of the 25.78 acre tract marked Matthews and of the 30-acre tract marked Lockhart and of the parcel marked Reservation 1.14 acre, all in Division E of the San Gabriel Orange Grove Association lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous Records in the office of the County Recorder of said county, and of a portion of W. G. McGregory's Subdivision, as per map recorded in Book 18, Page 44 of Miscellaneous Records in the office of the County Recorder of said County, described as a whole as follows: Beginning in the west line of Orange Grove Avenue, 100 feet wide at the northeast corner of land described in deed to John S. Cravens recorded in Book 1232, Page 104 of Deeds, records of said County; thence northerly along the east line of Lot 1 of said W. G. McGregory's Subdivision to the northeast corner of said Lot in the dividing line between said Matthews and Lockhart Tracts; thence continuing

northerly along the west line of Orange Grove Avenue to a line parallel with and distant 3 feet northerly, measured at right angles from said dividing line; thence westerly parallel with said dividing line, 484 feet; more or less to a line drawn at right angles to said dividing line from a point therein distant westerly 80 feet from the northwest corner of Lot 1 of said W. G. McGregory's Subdivision; thence southerly along said line drawn at right angles 3 feet to a point in said dividing line which point is the northeast corner of land described in deed to Lilly Busch, recorded in Book 2011, Page 211 of said Deed Records; thence along the east line of said land of Busch South $40^{\circ} 15'$ East 163.6 feet, more or less, to the westerly prolongation of the north line of said land described in deed to John S. Cravens first above mentioned; thence [78] easterly along said prolongation and north line 483.5 feet, more or less, to the point of beginning.

Parcel 3. That portion of the 25.78 acre tract marked "Matthews" in Division "E" of the San Gabriel Orange Grove Association Lands, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 2, Page 556, et seq., of Miscellaneous Records, in the office of the County Recorder of said County, described as follows: Beginning at a point in the west line of Orange Grove Avenue as now established, 100 feet wide, at the southeast corner of the land described as Parcel No. 4 in deed to Ernest P. Nolting, et ux., recorded in Book 20160, Page 25, Official Records of said County; thence westerly along the

southerly line of said land of Nolting to a point in the easterly line of the land described in deed to Louise G. Hill, et al., recorded in Book 9906, Page 289 of said Official Records; thence southerly along said easterly line of said land of Hill to a point in the southerly line of said 25.78 acre tract; thence easterly along the south line of said 25.78 acre tract, 42.38 feet, more or less to the southwest corner of the land described in deed to Arthur H. Fleming recorded in Book 2392, Page 179 of Deeds; thence north 3 feet to the northwest corner of said land of Fleming; thence easterly parallel with the southerly line of said 25.78 acre tract, a distance of 483.78 feet, more or less, to a point in the said west line of Orange Grove Avenue; thence northerly along the westerly line of said Avenue 276.46 feet, more or less to the point of beginning. [79]

As of this date, the undersigned Appraiser finds the fair market value of the above-described real property to be Sixty-Five Thousand Dollars and no/100 (\$65,000.00).

/s/ ELDRED L. MEYER.

Subscribed and sworn to before me, this 1st day of August, 1951.

[Seal] /s/ PAUL ARMOND,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires October 10, 1954.

[Endorsed]: Filed September 4, 1951. [80]

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 12,703-BH

In the Matter of the Action Commenced in the
United States District Court for the Eastern
District of New York entitled:

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC.,
et al.,

Defendants.

ORDER FOR SALE OF REAL PROPERTY
COMMONLY KNOWN AS 915-955-1003
ORANGE GROVE AVENUE, PASADENA,
CALIFORNIA, BY RECEIVER AT PUB-
LIC SALE

Upon the annexed petition of Joseph F. Ruggieri,
Receiver herein, and upon the exhibits attached
thereto, and the orders of the United States District
Court for the Eastern District of New York, it is

Ordered that Joseph F. Ruggieri, as Receiver
appointed in the action entitled "In the Matter of
the Action Commenced in the United States Dis-
trict Court for the Eastern District of New York,
Entitled United States of America, Plaintiff, vs.
Canadian American Company, Inc., et al., Defend-

ants,"—sell, at public auction, to the highest bidder or bidders, in Courtroom No. 8 in the United States Post Office and Court House Building, at Los Angeles, California, on Monday, the 29th day of October, 1951, at the hour of ten [81] o'clock a.m., Pacific Standard Time—all of said Receiver's right, title and interest in and to the premises commonly known as 915-955-1003 Orange Grove Avenue, Pasadena, California, and more particularly described in said annexed petition of Joseph Ruggieri, Receiver herein, and the "Notice of Sale" hereinafter referred to; and it is further

Ordered that the offer of Theodore J. Ticktin to purchase said property, referred to in said Receiver's petition, be considered at said time; and it is further

Ordered that this Court will consider such other and further business as may properly come before the Court at said time in connection with such sale; and it is further

Ordered that notice of this sale be mailed within ten (10) days from the date of this Order to all parties who have appeared in this proceeding in this District, and to the Attorney General of the State of California, the County Counsel of the County of Los Angeles, California, and the City Attorney of the City of Pasadena, California; and it is further

Ordered that a copy of said notice of sale be published in the Los Angeles Daily Journal, a newspaper regularly published in the County of Los Angeles, California, once a week for four consecu-

tive weeks commencing on September 24, 1951; and it is further

Ordered that said notice shall be substantially in the form and content of the notice hereto annexed, which this court hereby approved; and it is further

Ordered that in the conduct of such sale the Receiver may pay a real estate brokerage commission in a sum equal to two and one-half per cent (2½%) of the sales price to the broker producing the successful bid.

Dated at Los Angeles, California, this 20th day of September, 1951.

/s/ BEN HARRISON,

United States District Judge.

Docketed and Entered Sept. 21, 1951.

[Endorsed]: Filed Sept. 21, 1951. [82]

[Title of District Court and Cause.]

PETITION FOR ORDER AUTHORIZING
SALE OF REAL PROPERTY COMMONLY
KNOWN AS 915-955-1003 ORANGE GROVE
AVENUE, PASADENA, CALIFORNIA, BY
RECEIVER AT PUBLIC SALE

Comes now Joseph F. Ruggieri, Receiver in the action entitled United States of America against Canadian American Company, Inc., et al., by and through his attorney, Joseph Jaspan, alleges and represents to the Court as follows:

I.

That by an order dated December 5, 1950, made and entered in the United States District Court for the Eastern District of New York, petitioner was appointed receiver of the assets and property of James Albert Wigmore and Canadian American Company, Inc.

II.

That by order dated February 9, 1951, the receivership was extended and petitioner was also appointed Receiver of the assets of National Munitions Company of Eldred, Pennsylvania. [87]

III.

Pursuant to Title 28 U.S.C. Section 754, copies of the aforementioned orders and the complaints in said action were filed with the Clerk of the United States District Court for the Southern District of California.

IV.

That on December 5, 1950, Wagner Realty Company was the owner of the property known as 915-955-1003 Orange Grove Avenue, Pasadena, California, which property is more fully described in the attached exhibit, Marked Exhibit "1."

That petitioner became the owner of the outstanding issued stock of Wagner Realty Company on December 5, 1950.

That by resolution of Wagner Realty Company said property was conveyed to and title was vested in Joseph F. Ruggieri as Receiver by grant deed

duly recorded in the office of the County Recorder of Los Angeles County, on March 1, 1951.

V.

That by order entered in the United States District Court for the Eastern District of New York, the Receiver was authorized to sell and convey said property to the highest bidder at a judicial sale, the time, place and manner of which are to be fixed by an order of the United States District Court for the Southern District of California.

VI.

That the Receiver herein obtained an offer of \$60,110.00 from D. B. Salisbury for said property, consisting of approximately eight acres, upon which there is presently one structure; that said offer was presented to this Court in certain proceedings had herein for the sale of said property by petition of this Receiver, and a hearing thereon was held before the Honorable James M. Carter, on August 13, 1951, considered by the Court and sale of said property ordered made to said D. B. Salisbury; that all of said proceedings [88] were thereafter set aside upon order of this Court duly made in this proceeding, reference to which is hereby made for further particulars;

That the Receiver herein has obtained an offer to purchase said property from Theodore J. Ticktin for the sum of \$80,000.00, a copy of said offer being hereto attached, marked Exhibit "2"; that since the date of said offer, pursuant to the order

of this court, and on August 31, 1951, said Theodore J. Ticktin deposited with this Receiver the further sum of \$10,000.00, which additional sum your Receiver is holding pursuant to said offer and the order of this court made herein in connection therewith.

VII.

That said offer is conditioned upon approval of the Court and subject to further bidding at a public judicial sale.

VIII.

That said offer was produced by Benjamin A. Satoznik, licensed real estate broker.

That the Receiver has agreed, subject to the approval of the Court, to pay a real estate broker's commission of 2½% in the event the bid of said Theodore J. Ticktin is accepted by this court.

IX.

The Receiver respectfully prays that a public sale be held in this Court, in a department thereof, and at a time to be fixed by an appropriate order of this Court, at which the bid of said Theodore J. Ticktin may be considered and such other and further bids as may be made for said property may likewise be considered.

Wherefore, Petitioner, as Receiver, respectfully prays that the property described in the attached Exhibit "1" be sold at public judicial sale in the United States District Court, for the Southern District of California, in accordance with the terms of the attached order.

Dated September 17, 1951.

/s/ JOSEPH JASPAN,
Attorney for Receiver.

[Endorsed]: Filed September 20, 1951. [89]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That D. B. Salisbury, the bidder to whom the sale was made and ordered by the Court on August 13, 1951, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and the whole thereof made by this Court on August 31, 1951, and dated, filed and entered in this action August 31, 1951, vacating the order therein referred to made in this proceeding on August 13, 1951.

/s/ MARVIN OSBURN,
BERNARD C. BRENNAN,
By /s/ MARVIN OSBURN,
Attorneys for
D. B. Salisbury.

[Endorsed]: Filed September 26, 1951. [93]

[Title of District Court and Cause.]

ORDER SETTING TIME FOR HEARING
ON RECEIVER'S MOTION FOR ORDER
REQUIRING APPELLANT, D. B. SALIS-
BURY, TO FURNISH AND FILE SUPER-
SEDEAS BOND AND FIXING NOTICE OF
HEARING

Upon reading the annexed motion and good cause
appearing therefor,

It Is Hereby Ordered:

(1) That the hearing on said motion be and the
same is hereby set for and will be heard on the
22nd day of October, 1951, at the hour of 10 o'clock
a.m., in Courtroom No. 8, before Honorable Ben
Harrison, United States District Judge;

(2) That the time for giving notice of such
hearing shall be and it is hereby shortened so that
the same may be given by serving a copy of the
annexed motion, a copy of this order, and a copy
of the affidavit of Leo V. Silverstein, dated October
17, 1951, by depositing the same, with postage
thereon fully prepaid, in the [99] United States
mail at Los Angeles, California, on or before the
hour of five o'clock p.m. on October 17, 1951, to
each of the following, to wit:

Theodore J. Ticktin, 5226 Linwood Drive, Los
Angeles 27, California;

Marvin Osburn and Bernard C. Brennan,
attorneys for D. B. Salisbury, 210 West 7th
Street, Los Angeles 14, Calif.;

Robert H. Dunlap, attorney for William Wilson Company, 800 First Trust Building, Pasadena, California;

Mr. Ernest Tolin, United States Attorney, 600 Federal Building, Los Angeles 12, California, attention Mr. Eugene Harpole, Special Attorney;

Harold W. Kennedy, County Counsel, County of Los Angeles, 1100 Hall of Records, Los Angeles 12, California, attention Andrew O. Porter;

Edmund C. Brown, Attorney General of the State of California, 217 West First Street, Los Angeles 12, California, attention Mr. Edward Sumner;

Mr. H. Burton Noble, City Attorney for the City of Pasadena, Room 202, City Hall, Pasadena 1, California, attention Mr. Robert E. Michalski.

That service aforesaid shall constitute and be service of notice of the hearing on said motion.

Dated October 17, 1951.

/s/ LEON R. YANKWICH,
United States District
Judge. [100]

[Title of District Court and Cause.]

RECEIVER'S MOTION FOR ORDER REQUIR-
ING APPELLANT, D. B. SALISBURY, TO
FURNISH AND FILE SUPERSEDEAS
BOND

Comes now Joseph F. Ruggieri, Receiver, in the action entitled "In the Matter of the Action Commenced in the United States District Court for the Eastern District of New York, Entitled United States of America, Plaintiff, vs. Canadian American Company, Inc., et al., Defendants,"—by and through his attorneys Joseph Jaspan and Leo V. Silverstein, and moves the Court for an order requiring Appellant, D. B. Salisbury, to furnish and file a good and sufficient Supersedeas Bond in form and amount to be approved by this Court, indemnifying said Joseph F. Ruggieri as such Receiver against all loss, cost, charge and expense suffered or incurred by him, or which may hereafter be suffered or incurred by him, by reason of the filing of that certain Notice of Appeal and the further prosecution of said [101] appeal, by which said D. B. Salisbury appeals to the United States Court of Appeals for the Ninth Circuit, from the order and the whole thereof, made by this Court on August 31, 1951, and dated, filed and entered in this action August 31, 1951, vacating the Order made in this proceeding on August 13, 1951, in the penal sum of not less than \$25,000.00.

This motion is based upon all of the records and

files of this proceeding which are by this reference made a part hereof, the affidavit of Leo V. Silverstein, filed herewith, the order setting time of hearing of this motion, and all other records and evidence which may properly be considered at the time of the hearing of this motion.

JOSEPH JASPAN, and
LEO V. SILVERSTEIN,
By /s/ LEO V. SILVERSTEIN,
Attorneys for Joseph F.
Ruggieri, Receiver.

Points and Authorities

A Supersedeas Bond should be required.

Rule 73(d) and (e), Federal Rules of Civil
Procedure.

[Endorsed]: Filed October 17, 1951. [102]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF RECEIVER'S MOTION TO REQUIRE APPELLANT TO FURNISH SUPERSEDEAS BOND

State of California,
County of Los Angeles—ss.

Leo V. Silverstein, being first duly sworn, deposes and says:

That affiant is one of the attorneys for Joseph F. Ruggieri, Receiver, in the above-entitled matter;

that upon the petition of the receiver, this Honorable Court on the 12th day of July, 1951, made and entered its order for sale of real property by Receiver at public sale, embracing all of the Receiver's right, title and interest in and to the premises commonly known as 915-955-1003 Orange Grove Avenue, Pasadena, California, more particularly described in the Petition of Joseph F. Ruggieri, Receiver herein, and "Notice of Sale" given pursuant to said order, likewise dated the 12th day of July, 1951, [103] which property, for convenience, is hereinafter in this affidavit referred to as the "Orange Grove Avenue Property";

Reference to the petition of the Receiver for an order for sale of said Orange Grove Avenue property is hereby made for further particulars in all respects as though set forth in full herein;

That one D. B. Salisbury, under date of May 21, 1951, made an offer in writing to said Receiver to purchase said Orange Grove Avenue property for the sum of \$60,110.00;

That said offer, in part, provided as follows:

"This offer is made subject to the conveyance of good and sufficient title, seller to furnish customary policy of title insurance at a liability of \$60,110.00 showing property free and clear of all encumbrances excepting general and special City and County taxes of the fiscal year 1951-1952 and conditions and restrictions of record, if any, as above provided.

"Taxes of the fiscal year 1951-1952 to be prorated and paid by the buyer from date of confirmation of sale.

“It is understood that this property is owned by Joseph F. Ruggieri, Receiver, in the matter of the United States of America vs. Canadian American Co., Inc., et al., and that the completion of this purchase is subject to the confirmation by the appropriate United States District Court, it being understood that you will take all necessary legal steps immediately to procure confirmation of sale at the earliest possible date.

“It is further agreed that in the event the title is not delivered to us by reason of failure of the Court to approve or by reason of the fact that some other purchaser shall have made a higher bid at a judicial sale or in accordance with the terms of any court order, or by reason of the unmarketable title, the obligation of the Receiver hereunder, or of the Offeror hereunder, shall both be cancelable and both shall be discharged of any liability on their part upon the return of the deposit made hereunder. [104]

“Seller to furnish a contour survey by a licensed surveyor at his expense.

“If this offer is accepted, we shall take title in the names of D. B. Salisbury and Verne Salisbury, his wife, as joint tenants.

“It is a part of this offer that the completion of this sale and the delivery of the Title Policy of the subject property hereunder shall be completed on or before July 31st, 1951, or the deposit funds be returned to the offeror.”

That under date of July 16th, 1951, said D. B.

Salisbury signed and delivered to the Receiver a document in words and figures as follows:

“1235 Crescent Hgts. Blvd.,

“Los Angeles, California,

“July 16, 1951.

“Mr. Joseph Ruggieri,

“c/o Mr. Joseph Jaspan,

“16 Court Street,

“Brooklyn 2, N. Y.

“Dear Mr. Ruggieri:

“We refer to our letter to you dated May 21st, 1951, in which we offered to purchase certain property in the City of Pasadena. This offer expires July 31st, 1951.

“We now understand from Mr. Clay Robbins that August 13th, 1951, has been set as the date for the final court hearing in this matter, at which approval will be given for the sale of the subject property. We, therefore, hereby extend the time limit on our offer to expire at midnight on August 13th, 1951, all other terms and conditions of our letter of May 21st, 1951, to remain unchanged. Further, in the event the court approves the sale of the subject property to us by midnight August 13th, we will allow a further period to midnight, August 31st, 1951, for completion of documentation and delivery of clear title.

“D. B. SALISBURY.” [105]

That pursuant to said order authorizing sale and the notice thereof, proceedings were had in this

court before the Honorable James M. Carter on August 13th, 1951, whereby the said offer of Salisbury was approved by this Court;

That thereafter and on the same day one Theodore J. Ticktin offered to purchase said property for the sum of \$80,000.00 and on August 15th, 1951, made a written offer to said Receiver to purchase said Orange Grove Avenue property for the sum of \$80,000.00, and deposited with the Receiver the sum of \$10,000.00 as a good faith deposit in connection with said offer;

That thereafter the Receiver made a motion before the Honorable James M. Carter to vacate and set aside the minute order authorizing the Receiver's Sale of said property to Salisbury and the hearing thereon was regularly noticed and heard on August 22nd, 1951, before the Honorable James M. Carter, and an order was duly entered in this proceeding, dated August 31st, 1951, vacating and setting aside the minute order made herein on August 13th, 1951, authorizing the sale of said Orange Grove Avenue property to said Salisbury;

Reference is hereby made to the affidavit of Theodore J. Ticktin, sworn to on the 15th day of August, 1951, the motion of Joseph F. Ruggieri as Receiver to vacate and set aside the minute order authorizing Receiver's sale of real property and for further proceedings re sale, filed herein on August 16, 1951, and the order on motion of Receiver to vacate minute order dated August 31st, 1951, are on file in this proceeding, and the same are hereby incorporated herein and made a part

of this affidavit as though set forth in full herein;

That thereafter, pursuant to said order, upon motion of Receiver to vacate minute order, said Ticktin deposited with the Receiver the additional sum of \$10,000.00, and the Receiver filed a petition for an order authorizing the sale of said Orange Grove Avenue property at public sale based upon the offer of said Ticktin;

That an order for the sale of said real property, pursuant [106] to said petition, was granted on September 20th, 1951, by the Honorable Ben Harrison, and the sale thereon is now set for Monday, October 29th, 1951, in Court Room No. 8 of this Court at the hour of ten o'clock a.m.;

That on the 4th day of September, 1951, the Receiver returned to said D. B. Salisbury upon his demand the sum of \$6,100.00, being the deposit made by him at the time of his offer to purchase said Orange Grove Avenue property;

That said offer of Theodore J. Ticktin requires that the Receiver, before the consummation of such sale to him, shall furnish and deliver to him an Owner's Policy of Title Insurance; that before any sale—whether it be to Theodore J. Ticktin or anyone else—may be consummated, it will be necessary for the Receiver to obtain and furnish to any such purchaser an Owner's Policy of Title Insurance, issued by a title insurer authorized to transact title insurance business in the State of California;

That on September 26th, 1951, said D. P. Salis-

bury filed herein Notice of Appeal, by which he purportedly appeals to the United States Court of Appeals for the Ninth Circuit, from the order and the whole thereof made by this court on August 31st, 1951, and dated, filed and entered in this action August 31, 1951, vacating the minute order herein referred to, made in this proceeding on August 13, 1951.

That affiant is informed and believes and so avers that as long as said purported appeal is pending, no company authorized to issue Owner's Policies of Title Insurance will issue an Owner's Policy of Title Insurance acceptable to said Ticktin and which the Receiver is obligated to furnish upon the consummation of the sale of said Orange Grove Avenue property to said Ticktin, nor will any such title company issue an acceptable Owner's Policy of Title Insurance to any other successful bidder at the sale now set for October 29th, 1951, hereinabove referred to. [107]

That said D. B. Salisbury should be required to furnish and file herein a Supersedeas Bond, in form and amount approved by this Court, indemnifying the Receiver against all loss, cost, charge and expense suffered or incurred by him and which may hereafter be suffered or incurred by him by reason of the filing of said Notice of Appeal and further prosecution of said appeal, in a penal sum of not less than \$25,000.00.

That this affidavit is made in support of the Receiver's motion, filed concurrently herewith, for

an order requiring the appellant D. B. Salisbury to furnish and file a Supersedeas Bond.

Dated October 17, 1951.

/s/ LEO V. SILVERSTEIN,

Subscribed and sworn to before me this 17th day of October, 1951.

[Seal] /s/ MARIE TREAIS,

Notary Public in and for Said
County and State.

[Endorsed]: Filed October 17, 1951. [108]

United States District Court, Southern District of
California, Central Division

[Title of Cause.]

MINUTES OF THE COURT

October 22, 1951

Present: The Honorable Ben Harrison,
District Judge.

Nature of Proceedings

Hearing on motion of Joseph F. Ruggieri, Receiver, for an order requiring appellant D. B. Salisbury, to furnish and file supersedeas bond, in the sum of not less than \$25,000.00, pursuant to motion, order setting time for service and hearing of said

motion, and affidavit of Leo V. Silverstein, filed 10/17/51.

Ruling

Court fixes supersedeas bond in the amount of \$20,000.00.

EDMUND L. SMITH,
Clerk. [111]

[Title of District Court and Cause.]

ORDER ON MOTION OF RECEIVER FOR ORDER REQUIRING APPELLANT, D. B. SALISBURY, TO FURNISH AND FILE SUPERSEDEAS BOND

The motion of Joseph F. Ruggieri, Receiver herein, for an Order Requiring Appellant, D. B. Salisbury, to furnish and file Supersedeas Bond having come on regularly for hearing on October 22nd, 1951, and having been duly considered, the Court makes the following Order:

It Is Hereby Ordered:

- (1) That the said motion is hereby granted;
- (2) That D. B. Salisbury shall furnish the Receiver and file herein, on or before 5:00 o'clock p.m., Friday, October 26, 1951, a bond or undertaking in the penal sum of \$20,000.00, substantially in the form attached to this Order, duly executed by said D. B. Salisbury with two individual sureties or with a corporate surety, which said [112]

bond shall first be approved by this Court, or in lieu of said bond he shall deposit \$20,000.00 cash with the Clerk of this Court as provided for by the Rules of this Court;

(3) That upon the furnishing and filing of said bond so approved, further proceedings for the sale of the property described in the petitions on file herein and commonly known and designated as the "Orange Grove Avenue Property" shall be stayed until the final disposition of the appeal taken by said D. B. Salisbury by Notice of Appeal filed herein on September 26th, 1951—said appeal being from the Order, and the whole thereof, made by this Court on August 31st, 1951, and dated and filed and entered in this action August 31st, 1951, vacating the Order made in this proceeding on August 13th, 1951, all relating to said Orange Grove Avenue Property;

(4) That should said bond or undertaking be not furnished and filed in the form and within the time as required by this Order the sale of said Orange Grove Avenue Property shall be made pursuant to the Orders of this Court heretofore or hereafter made.

Dated October 25, 1951.

/s/ BEN HARRISON,
Judge.

Approved as to Form:

MARVIN OSBURN and

BERNARD C. BRENNAN,

By /s/ MARVIN OSBURN,

Attorneys for D. B. Salisbury.

[Endorsed]: Filed October 25, 1951. [113]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That D. B. Salisbury, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order and the whole thereof made by this Court in Minute Order made October 22, 1951, and by signed Order made October 25, 1951, which Order directs that Appellant D. B. Salisbury be required to furnish and file supersedeas bond.

/s/ MARVIN OSBURN,

BERNARD C. BRENNAN,

By /s/ MARVIN OSBURN,

Attorneys for

D. B. Salisbury. [118]

[Endorsed]: Filed Oct. 26, 1951.

In the United States District Court, Southern
District of California, Central Division

No. 12,703

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC.,
et al.,

Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, August 13, 1951

Appearances:

For the Plaintiff:

ERNEST A. TOLIN,

United States Attorney, by

EDWARD R. McHALE,

Asst. United States Attorney.

For the Receiver:

LEO V. SILVERSTEIN, ESQ.

For Respondents:

EDMUND G. BROWN,

Attorney General, State of California;

HAROLD W. KENNEDY,

County Counsel, County of

Los Angeles;

H. BURTON NOBLE,

City Attorney, City of Pasadena.

The Court: You may proceed.

The Clerk: 12,703, United States against Canadian-American Company and others for public auction of property known as 915, 955 and 1003 Orange Grove Avenue, Pasadena, and consideration of other matters.

There is also the consideration of the offer of D. B. Salisbury.

Mr. Silverstein: I am appearing on behalf of the receiver.

The Court: This is a public sale that has been heretofore noticed in the courtroom of Judge Ben Harrison, who is now on vacation, and therefore been transferred to this court.

It involves real property which has been described in the notice of sale, and that notice of sale is on file with the clerk of this court.

Mr. Silverstein, do you have a copy of the notice of sale?

Mr. Silverstein: Yes, your Honor.

The Court: Will you hand it to the clerk?

Mr. Silverstein: Yes, your Honor.

The Court: The notice of sale indicates there are involved three parcels of land. The street address of these parcels is 915, 955 and 1003 Orange Grove Avenue, Pasadena. Anyone more particularly interested in the description may inspect [2*] the notice of sale in the original file, a copy of which has been handed to the clerk and which I have in my possession, or you may inspect the copy that is here in court.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The notice states:

“Notice is further given that D. B. Salisbury has offered to purchase said real property and pay therefor the sum of \$60,110, all more particularly set forth in the petition of this receiver filed in said proceedings on July 12, 1951.”

Mr. Silverstein: If your Honor please, with reference to any brokerage features that are set forth in the petition——

The Court: What is set forth about that?

Mr. Silverstein: With reference to any brokerage commissions.

The Court: I don't understand you. What was set forth in the petition?

Mr. Silverstein: As to what brokerage commissions, if any, are to be paid.

The Court: And what is that?

Mr. Robbins: The brokerage commission provides that on the original bid there shall be a commission paid of five per cent to the broker who obtained that bidder. If the sale is confirmed to someone other than the original bidder and the broker who produces the purchaser under the bid shall receive one-half of that commission and the other half shall go to the [3] broker who originated the original bid.

The Court: Is that provided in the order by Judge Harrison?

Mr. Robbins: That is provided in the order, yes, sir.

The Court: All right. There has been a bid made to the receiver of \$60,110.

Is this a cash bid? And I take it that under the ordinary practice there would have to be 10 per cent of that amount deposited at the time the bids are made and the balance to be paid at the time of the execution of the order by the court.

Do I hear any higher or better bid for this property?

A Voice: What is the necessary amount to be raised?

The Court: The law does not require in these matters, in the sale of property in Federal Court, so I am informed by the receiver's attorney, that there be any fixed amount of a new bid. That is, a new bid doesn't have to exceed the old bid in any fixed amount.

However, I suggest that bidders probably know what they are prepared to bid for this property and therefore make some bid in an amount that they think it is approximately worth without taking up a lot of time of the court. Do you understand that?

A Voice: Yes, sir.

The Court: Do I hear any higher or better bid for these three parcels of property than that listed in the notice of sale and in the file in this case?

(No response.) [4]

The Court: I am ready to sell this property.

A Voice: We decided not to bid.

The Court: Let the record show the gentleman who asked the question heretofore has been con-

ferring with several other men and now says he has decided not to bid.

Any other bids other than the one listed in the notice of sale for \$60,110? If not, the property is sold to D. Salisbury for \$60,110.

A formal order should be drawn, Mr. Silverstein, and submitted for signature.

Mr. Silverstein: Yes, your Honor. [5]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of August, A.D. 1951.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed November 1, 1951.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Thursday, August 30, 1951

Appearances:

For the Plaintiff:

ERNEST A. TOLIN, ESQ.,

United States Attorney, by

EUGENE HARPOLE, ESQ.,

Special Attorney, Bureau of Internal
Revenue.

For Receiver:

LEO V. SILVERSTEIN, ESQ., and

CLAY ROBBINS, ESQ.

For D. B. Salisbury:

BRENNAN & CORNELL, by

B. C. BRENNAN, ESQ.

Also Present:

GEORGE READ,

Representative of The William Wilson
Company.

The Court: Civil No. 12,703-BH, in the matter of the action commenced in the United States District Court for the Eastern District of New York, entitled United States of America, Plaintiff, vs. Canadian American Company, Inc., et al., Defendants. Have you the appearances of counsel?

The Clerk: Yes, I have.

The Court: I have given some consideration to this matter and I have written down here generally my views on it.

It is the general rule in the federal courts that a judicial sale will be confirmed where it has been properly conducted unless the price is so grossly inadequate as to shock the conscience of the court. Where the price is not so grossly inadequate, and the facts show that there were mistakes, surprises, et cetera, then the sale may be set aside, if the confirmation has not yet taken place. Where the confirmation has occurred, then a stronger showing is necessary.

In speaking of a price which is grossly inadequate, the courts are referring to the value of the property and not the differences in the prices bid. But the court may look at the differences in the bids to determine the value of the property.

We come to the Stanley Engineering Corporation case, 164 F. 2d 316, and consider it. All the other cases are distinguishable either because the confirmation had already taken [3*] place, or the lower court had refused to set aside the prior sale, and the appellate court would not reverse on appeal, saying that this was a matter which was in the sound discretion of the lower court.

The question is: Is the Stanley case distinguishable from ours? First, there is a difference in price. In the Stanley case the difference between the original bid and the final bid was about \$10,000. In our case it was \$20,000. In the Stanley case there was

* Page numbering appearing at top of page of original Reporter's Transcript.

spirited bidding. In our case there was an opportunity for bidding but there was only one bid.

In the Stanley case there was no evidence that the Gaby Company, the highest bidder, attempted to be at the sale or that it had made any effort to be at the sale or that it attempted to stop the sale. The only fact that is stated is that it appeared the following day before confirmation and tendered a higher bid.

In our case there is evidence that Mr. Ticktin endeavored to stop the sale by calling my office and informing the secretary to tell the judge that he wanted to make a bid on the property and made inquiry about postponing the sale until such time as he could get there.

There was a misunderstanding on the part of the secretary, and through this misunderstanding that message was not conveyed to the court until the sale had already been made, and the [4] mistake was made at this point.

Had the message reached the court at any time prior to the actual closing of the sale, the court would have stopped the sale and given Mr. Ticktin a reasonable time to tender his bid.

It was a mistake, therefore, by an agent of the court in failing to transmit the message in time to stop the proceedings. This, I think, is sufficient ground, coupled with the increase in price, to warrant the court to refuse to confirm the sale and order a resale.

In the Pewabic Mining Co. case the holding does not seem to me to be to the contrary. In that case,

the telegram reached the referee in due time, but the referee with knowledge of the request held the sale anyhow, and the court with knowledge of the request confirmed the sale. The Supreme Court held that this was properly within the discretion of the lower court.

Had the message in our case reached the court in time, this court would have acted differently than the lower court acted in the Pewabic Mining Co. case. In other words, this court would have delayed the sale a reasonable time so that the bid could have been tendered. I don't believe that would be an abuse of discretion.

So here, the court would have delayed the sale until Mr. Ticktin had a reasonable time to appear and tender a bid, had [5] the message been delivered.

I am, therefore, going to set aside the sale and order a resale of the property and a republication of the sale, but I am going to do it upon conditions:

Number one. The broker in the case of the original sale earned a fee. The present bid makes provision for only a portion of the broker's fee that he earned, according to one conditional fee. That broker on the original sale shall be protected to the full extent of 5 per cent commission that he earned on the \$60,000.

Secondly, on condition that the payment of expenses of resale, for advertising and whatever other expenses are involved in the resale, be paid by the second bidder.

Thirdly, as an alternative situation, I want some sort of a guarantee that no loss will be suffered to this estate by setting aside the first sale. The first bid was for \$60,110, and the second bid was for \$80,000. The \$10,000 deposit has been made. There should either be a bond posted for the second sale so that this new bidder will bid the \$80,000 which he has tendered, and then, if he does not bid that amount, the estate will be protected, the receivership will be protected, or, in lieu of a bond, a sufficient deposit of money to represent the difference between the \$60,000 bid and the \$80,000 bid. In other words, I think that this new bidder ought to put on the line either the \$20,000 difference [6] between the \$60,000 and the \$80,000, or in the alternative give a bond that he will bid and pay the \$80,000 on the second sale. And if he makes a deposit of the money or puts up the bond, it should be so conditioned that in the event the new bidder doesn't go through with his offer, that \$20,000 inures to the benefit of this receivership as a penalty. If the bond of \$80,000 is put up and the property brings \$70,000, the penalty on the bond would only be \$10,000. If, on the other hand, the cash is put up and on the new bid the property brings \$70,000, then also the penalty should be the \$10,000, although the \$20,000 was deposited.

Do you understand what I mean?

It is going to be a little difficult to phrase, but the receiver estate should be protected for this

differential between the \$61,000 bid and the \$80,000 secondly bid.

If on a resale, however, the second buyer should default and not bid, but a sale should occur at \$70,000, then this new purchaser I think should only be penalized for the difference between the amount of the new sale and the \$80,000.

Now, fourthly, I want to consider, and this may take a moment or two, this matter of any losses that the first bidder may have incurred. I do not have any precedent to go on, but logically it seems to me that he should be protected for any expenses that he has been put to since the day that the property was sold to him in this court. He incurred other expenses [7] possibly prior to that time, and had this \$80,000 bid been in here at that time, those expenses that he incurred prior to that time would have been lost anyhow. But after the sale was made, he then relying on the sale may have incurred expenses and I think he should be protected, as a fourth and final condition, on anything that he is out of pocket since the time the sale was held in this court.

Now, Mr. Brennan, do you have any showing on that?

Mr. Brennan: I have no authority on that.

The Court: I do not mean authority, but I mean showing as to what that might be.

Mr. Brennan: Yes. I was not able to get hold of Mr. Salisbury this afternoon, but just generally there is the question of his counsel fee, whether that comes within your Honor's holding. That was

an expense that was entirely incurred after the sale instead of to attempt to hold the sale. And, secondly, a portion of the property, about one-third of it, as I understand, was sold for \$20,000 to another party. Now, it is true that that sale was made contingent upon the title coming through this court. However, there were some expenses incurred on that. There was another commission that was earned by the same company that Mr. Dunlap represents, on that. Now, whether that was a \$1,000 commission—it would be 5 per cent on \$20,000—they have have not made any direct representation on that at all. [8]

The Court: Is that commission collectible?

Mr. Brennan: No, I don't think that it is.

The Court: I doubt that it is collectible.

Mr. Brennan: I don't think that it is, and I think that probably is contingent upon the sale being ratified, and I don't know of any other expenses other than some incidental costs and probably the interest. It was \$6,000 that he deposited. Probably that is a matter that we would not press. I don't know of any other items of expense that he has had since that time.

The Court: When you speak of counsel fees, you refer to your fees?

Mr. Brennan: That is correct.

The Court: Are you prepared at this time to state what you think those fees should be?

Mr. Brennan: Well, I will tell you what my arrangement is with Mr. Salisbury. Win, lose or draw, my charge is \$500.

The Court: You mean since the date of the sale?

Mr. Brennan: Yes. I did not even know the man before that time, and all my services were for representing him since the date of the sale.

The Court: This court is inclined to think that is a reasonable fee. I will hear anybody that wants to be heard on it. I can pass on what is a reasonable fee without taking testimony and I think it is an expense that has been incurred. [9]

This condition will be that there be paid to Mr. Salisbury for the benefit of Mr. Brennan, or that there shall be paid to Mr. Salisbury and Mr. Brennan, the sum of \$500 counsel fees.

Secondly, his escrow fees or expenses are properly chargeable. That would only be from the date of the sale.

Mr. Brennan: We won't press that.

The Court: If you want that in the order, you can insert it.

Mr. Brennan: I don't know whether your Honor is going on the assumption that \$60,000 is still there. Now, I don't know what Mr. Salisbury's position will be. There was a condition placed upon the bid. that the bid would have to be accepted within a period of time and the escrow closed. I think there was that limitation upon the bid that was put in there and I doubt if he could be held to the \$60,000 sale.

The Court: I don't intend to hold him. I intend this to be opened up on a new sale, and his \$6,100 can be returned.

Mr. Silverstein: We have the check to return.

The Court: The order should provide that any money that Mr. Salisbury has deposited be returned to him.

Now, I am just winding up my month here in August and I am trying to get away. Is there any chance that you could prepare this order and get it submitted to me late tonight or early tomorrow morning?

Mr. Silverstein: Tomorrow morning? [10]

The Court: Yes. At what time?

Mr. Silverstein: At 5:00 o'clock? Any time your Honor wants to give us, we will have the order here.

The Court: That is a pretty big statement, because I will be at the office here probably at about 7:00 or 7:30 in the morning.

Mr. Silverstein: We will have it up here at whatever time your Honor sets.

Mr. Brennan: Mr. Read informs me that Mr. Dunlap is not here. Mr. Read is from the agency. He raises the question as to whether their firm should be reimbursed for Mr. Dunlap's fees, whether you feel that is included in the full commission, and that it at least should be before you as a part of the expenses he has incurred.

The Court: He hasn't lost his commission. I have provided for his commission. It is true he has not had counsel here on it. He is in the same position as if the sale had gone through, as a result of one of these conditions that I imposed. But it is true that he had to employ counsel to retain the Commission he earned.

Mr. Robbins: Your Honor, may I inquire with

reference to one or two items, with reference to the order?

The Court: Yes.

Mr. Robbins: Apparently it would be a very simple order with the exception of the bond or additional deposit. Now, [11] is it the court's order that Mr. Ticktin shall deposit with the receiver the additional sum of \$10,000, making a total of \$20,000, or execute a bond conditioned that he will make at the time of this sale a bid of not less than \$80,000?

The Court: That is right.

Mr. Robbins: Now, in addition to that, these fees or, say, expenses, including the \$3,000 commission, escrow charges, and fees and expenses allowed Mr. Salisbury is that to be in addition to the \$80,000 or will that be included within the \$80,000? In other words, as Mr. Silverstein points out, if it is in addition to the \$80,000, we may have difficulty in completing the sale.

The Court: Well, in the bid that was made, as I recall, \$2,000 of the \$3,000 broker's fee was already taken care of in the bid, isn't that right?

Mr. Robbins: $2\frac{1}{2}$ per cent of \$80,000. That would be \$2,000.

The Court: So there is an additional thousand of broker's fees, and there is \$500 to Mr. Brennan. The escrow fees wouldn't be over a hundred dollars. There would be about a \$1,600 differential.

Mr. Brennan, do you have any thought on that? Do you object if I let that be within the \$80,000?

Mr. Brennan: I would assume it would be dif-

ficult to impose upon the new bidder anything over and above what he [12] has guaranteed here.

The Court: All right.

The order will be that that be within the \$80,000, that is, his total bid. In other words, if the man makes a bid \$20,000 better and if I made this additional to the bid, of course, I would be attempting to jack him up into a higher bid. I think I will provide that that will be within the \$80,000 and not be on top of it.

Mr. Brennan: The receiver will still have very substantial expenses.

The Court: Is there anything further?

Mr. Silverstein, regarding this order, it may be you can get it approved as to form over the telephone and not have to go to the bother of submitting it to counsel.

Mr. Silverstein: If other counsel will agree.

Mr. Brennan: I am satisfied that, so far as my office is concerned, we will not require the opportunity of approving the order. I am sure Mr. Silverstein can handle it.

Mr. Silverstein: I do not know about other counsel.

The Court: Then, you can get the order placed under my courtroom door some time tonight or before 7:30 in the morning?

Mr. Silverstein: Before 8:00 o'clock in the morning?

The Court: Before 7:30 in the morning.

Mr. Silverstein: I don't know.

The Court: That means you can do it any time tonight. [13]

Mr. Silverstein: I don't think the girl in the office will be there to type it.

The Court: There are public stenographers available.

Mr. Silverstein: That is true. Yes, I believe that I can.

The Court: All right. [14]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of September, A.D. 1951.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed November 1, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Cali-

fornia, do hereby certify that the foregoing pages numbered from 1 to 118, inclusive, contain the original Certified Copy of Complaint; Certified Copy of Order Appointing Receiver for Canadian American Company, Inc., and James Albert Wigmore; Certified Copy of Order Authorizing Sale of Orange Grove Avenue Property in California; Order for Sale of Real Property by Receiver at Public Sale and Petition for Same filed July 12, 1951; Notice of Sale; Affidavit of Service of Notice of Sale; Order Setting Time for Hearing on Motion to Vacate Minute Order and Fixing Notice of Hearing and Motion to Vacate and Set Aside Minute Order Authorizing Receiver's Sale of Real Property and for Further Proceedings re Sale with Affidavit of Theodore J. Ticktin; Affidavit of Service; Receiver's Memorandum of Points and Authorities in Support of Motion to Vacate etc.; Affidavit of Leo V. Silverstein; Order on Motion of Receiver to Vacate Minute Order; Report of Appraiser; Order for Sale of Real Property Commonly Known as 915-955-1003 Orange Grove Avenue, Pasadena, California, by Receiver at Public Sale, petition for same and Notice of Sale filed Sept. 20, 1951; Notice of Appeal filed Sept. 25, 1951; Designation of Record on Appeal; Order Setting Time for Hearing on Receiver's Motion for Order Requiring Appellant to Furnish Supersedeas Bond, and Receiver's Motion for Order Requiring Appellant to Furnish Supersedeas Bond; Affidavit of Leo V. Silverstein; Affidavit of Service; Order

on Motion of Receiver for Order Requiring Appellant to Furnish Supersedeas Bond and Notice of Appeal filed Oct. 26, 1951, and a full, true and correct copy of minute orders entered August 13, 1951; August 30, 1951, and October 22, 1951, which, together with copy of reporter's transcript of proceedings on August 13 and August 30, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2nd day of November, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13149. United States Court of Appeals for the Ninth Circuit. D. B. Salisbury, Appellant, vs. Joseph F. Ruggieri, Receiver, etc., Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed November 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13149

In the Matter of the Action Commenced in the
United States District Court for the Eastern
District of New York, Entitled,

UNITED STATES OF AMERICA, *

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC.,
et al,

Defendants.

D. B. SALISBURY,

Appellant,

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

STATEMENT OF POINTS

On the Appeal taken by Notice filed September 26, 1951, from the written formal Order, dated, signed, filed and entered August 31, 1951, Appellant relies upon:

1. The Court erred in making said order as a whole and with respect to each of the five parts thereof.

2. The Court erred as a matter of law in making said order as to the whole thereof and separately in each respect as to each of the five parts thereof.

3. The Court abused its discretion in making said order and as to the whole thereof and separately in each respect as to each of the five parts thereof.

4. The Court erred in directing that the involved property be sold notwithstanding a prior order and sale made to Appellant on August 13, 1951, and in declaring vacated, said order of August 13, 1951.

On the Appeal taken by Notice filed October 26, 1951, from the written final order dated October 25, 1951, Appellant relies upon:

1. The Court erred by requiring in said order, that Appellant furnish a supersedeas bond.

2. The Court erred by requiring in said order that Appellant file a supersedeas bond by five o'clock, October 26, 1951, or specifying any time by which Appellant was required to furnish a supersedeas bond.

3. The Court erred in paragraph (4) of said order in providing that sale of the involved property be made pursuant to "Orders of this Court heretofore or hereafter made" unless Appellant furnish said supersedeas bond by five o'clock, October 26, 1951.

Said written orders of August 31, 1951, and October 25, 1951, will be found respectively on pages 75 and 112, and said Notices of Appeal of Sep-

tember 26 and October 26, 1951, will be found respectively on pages 93 and 118 of the certified record on Appeal.

/s/ MARVIN OSBURN,
Attorney for Appellant
D. B. Salisbury.

[Endorsed]: Filed November 19, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1950

Dec. 15—Fld. cc. copy compl. & ord. appointg. Receiver for Canadian Amer. Co. & James Albert Wigmore, recd. fr. East. Dist. of N. Y., fld. pur. to Title 28, Sec. 754, JS5.

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Feb. 19—Fld. cc. amend. compl. & cc. ord. apptg. receiver, rec'd fr. Clerk, East. Dist. of N. Y.

Feb. 28—Ent. ord. permit Joseph. Jaspan, Esq., of Brooklyn, N. Y., to practice in this court for the purposes of this case, only, atty. Joseph Jaspan being atty. for recr. herein.

Mar. 2—Fld. Receiver's not of mot. retble. 4/16/51 10 a.m. for instructions relative to respective rights of State of Calif., City of Pasa-

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dena, Co. of L. A. & U.S.A. in & to real prop. Fld. Receiver's petn. for instructions.

Mar. 19—Fld. retn. svce. not. of mot.—retn. svd.

Apr. 16—Fld. retn. svce. of not. of mot.—retn. svcd.
on Sec. of State.

Apr. 16—Ent. ord. contg. 5/21/51 hrg. petn. Recr.
for instructions, etc.

Apr. 26—Fld. memo of Recvr. for instructions relative to rights of respective taxg. auths. to share in proceeds of real property, etc.

May 15—Ent. ord. cont. hrg. on petn. of Jos. F. Ruggieri, Recr., fld. 3/2/51, for insts. etc., fr. 5/21/51 to 5/28/51 10 a.m. Mld. notices counsel.

May 28—Ent. proc. & ord. cont. to 6/11/51 9:30 a.m. hrg. petn. of recvr. fld. 3/2/51, for insts., etc.

June 11—Ent. proc. & ord. cont. 7/9/51, 10 a.m., hrg. petn. of recr., fld. 3/2/51 for insts., etc.

July 6—Fld. certd. copy, ord. of U.S. Dist. Court, East Dist. of N. Y., authorizing sale Orange Grove Ave. property in Calif.

July 6—Fld. plfs. affid. svce. by mail re ord. auth. sale.

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- July 9—Ent. proc. hrg. petn. of Joseph F. Ruggieri, Recr., fld. 3/2/51, etc., & stip. re priority of liens, is presented, & counsel directed to prepare & present formal ord. for sign. Fld. stip. re priority of liens.
- July 12—Fld. ord. for sale of real property by Recvr. at public sale.
- July 13—Dktd. & ent. ord. on stip. that prop. known as 270 Wigmore Drive, Pasadena, Calif., etc., was on 12/5/50 vested in James Albert Wigmore & Pearl Johnstone Wigmore, subject to a trust & cert. liens & that on 2/5/51 said Wigmore's directed trustee to convey said prop. to a designee of Joseph F. Ruggieri, receiver & said prop. is now vested in said receiver or his designee; fur. settg. forth amt. of various liens for city, county & federal taxes & directg. receiver to sell said prop. at public auction, settg. forth manner of sale & pymt. of said tax liens, etc., & fur. ord. that title to prop. known as 915-955 & 1003 S. Orange Grove Ave., Pasadena, Calif., was vested in Wagner Realty Co. prior. to 2/28/51 at which date Joseph F. Ruggieri took possession as receiver & ord. said receiver to sell said property at public auction & fxg. manner of pymt. of liens thereon, htf. fld. 7/11/51.

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- July 20—Fld. recvrs. not. of sale. Fld. affid. of svce. by mail.
- July 26—Fld. plfs. affid. svce. by mail re ord. auth. sale Wigmore residence. Fld. certd. copy ord. of U. S. Dist. Ct. for East. Dist. of N. Y., auth. sale of Wigmore residence in Calif.
- Aug. 6—Fld. affid. of publication.
- Aug. 13—Ent. Proc. on public auction & Ent. Ord. propt. known as 915-955-1003 Orange Grove Ave., Pasadena, Calif., be sold to D. B. Salisbury for \$60,110.00 (no other bids recd.); Counsel for Recvr. to prepare & present written Ord. thereon. (C.)
- Aug. 16—Fld. Mot. & Ord. Setting Time at 8/22/51, 10 a.m., for Hrg. on Mot. to Vacate Minute Ord. Authorizing Recvr's. Sale of Real Propt. & Ord. Shortening Time for Svce.
- Aug. 20—Fld. Certd. Copy of Ord. Auth. Recvr. to institute suit re 270 Wigmore D., Pasadena, Calif. Fld. Affid. of Svce by mail of Mot. to Vacate & Set Aside Min. Ord. Auth. Recvr's. Sale of Real Propt. & for fur. Proc. re sale & Ord. setting time for Hrg. & Fxg. Not. of Hrg.
- Aug. 24—Fld. Recvr's. Memo. of Pts. & Auths. in Sup. of Mot. to Vacate & Set Aside Min. Ord. Auth. Sale of Real Propt. Fld. Memo.

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of Pts. & Auths. in Oppos. to Mot. to Vacate & Set Aside Min. Ord., etc. Fld. Memo. of Pts. & Auths., re Mot. to Set Aside Sale of Propt. to D. B. Salisbury.

Aug. 27—Ent. Proc. Hrg. Mot. Recvr. to Set Aside Ord. of 8/13/51 & Ord. Stand Submitted (C). Fld. Affid. Leo V. Silverstein.

Aug. 30—Ent. Proc. & Oral Decision Grantg. Mot. Recvr. to Set Aside Sale to D. B. Salisbury on cert. conditions; Counsel for Recvr. to prepare form of order thereon for Ct's. Signature forthwith. (C.) Mot. fld. 8/31/51.

Aug. 30—Fld. Ord. on Mot. of Recvr. to Vacate Minute Ord. of 8/13/51. M. fld. 8/31/51.

Sept. 4—Fld. Report of Appraiser.

Sept. 11—Fld. Not. of Ord. on Mot. of Recvr. to Vacate & Set Aside Min. Ord. Auth. Sale of Real Propt.

Sept. 21—Dktd. & Ent. Ord. for Sale of Real Propt. known as 915-955-1003 Orange Grove Avenue, Pasadena, California, Providing for Notices & for Publ. said Notice, etc., fur. Ord. that Offer of Theodore J. Ticktin to Purchase be Considered at said Sale, etc., & Allow Recvr. to pay Brokerage Commission of 2½% of Sale Price, with Petn. of Joseph F. Ruggieri, Recvr., &

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Not. of Sale Attached thereto, htf. fld. 9/20/51. Dktd. & Ent. Ord. for Sale Real Propt. known as 270 Wigmore Drive, Pasadena, California, providing for Notices & for Publ. said notice, etc., fur. Ord. that Offer of Richard Rand to purchase be considered at said Sale, etc., appointing Eldred L. Meyer to Appraise value of said Propt. & Allow him Compens. of \$25.00 per diem, & fur. Allow Recvr. to pay brokerage Commission in Accord with Probate Rules of this Distr., etc., with Petn. of Joseph F. Ruggieri, Recvr., & Not. of Sale attached thereto, htf. fld. 9/20/51.

Sept. 25—Fld. Affid. of Svce. by Mail of Notices of Sale.

Sept. 26—Fld. Not. of Appeal of D. B. Salisbury. Filed Cash Bond on Appeal in Amt. of \$250.00. Sent. Copy to Leo Silverstein, Atty.

Oct. 11—Fld. D. B. Salisbury's Desig. of Contents of Rec. on Appeal.

Oct. 15—Fld. Report of Appraiser.

Oct. 17—Fld. Recvr's. Mot. for Ord. Requiring Appellant D. B. Salisbury to Furnish & File Supersedeas Bond & Ord. thereon retble. 10/22/51, 10 a.m. Fld. Affid. of Leo Silverstein in Sup. thereof.

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- Oct. 18—Fld. Affid. of Publ. (2 Documents). Fld. Affid. of Svce. by Mail by Atty. for Recvr.
- Oct. 22—Ent. Proc. on Mot. of Ruggieri, Recvr., for an Ord. Requiring Appellant D. B. Salisbury to Furnish Supersedeas Bond, & Ent. Ord. Fxg. Supersedeas Bond at \$20,000.00.
- Oct. 25—Fld. Ord. on Mot. of Recvr. for Ord. Requirg. Appellant, D. B. Salisbury, to Furnish & File Supersedeas Bond.
- Oct. 26—Fld. Not. of Appeal of D. B. Salisbury from Ord. Directing the Flg. of Supersedeas Bond. Mld. Copy to Atty. Leo Silverstein.
- Oct. 29—Fld. Affid. of Svce. Ent. Ord. Accepting Offer of Richard Rand to Purchase Propt. 270 Wigmore Drive, Pasadena, for \$38,000.00, in accordance with Ord. to be Prep. for Sign. of Ct. Ent. Ord. Postponing fur. Proc. re Sale of Orange Grove Ave. Propt. in Pasadena, Calif., to 11/26/51—Notice Waived.
- Nov. 1—Fld. Reprts. Transc. of Proc. of 8/13/51 & 8/30/51.
- Nov. 2—Issd. for D. B. Salisbury on 2 Appeals to C. A. (original papers) Certd. Transc. of Rec. 5 pp. @ 40c, \$2.00, and Forwarded 2 Vols. Reprts. Transc.

1951

Nov. 5—Fld., Dktd. & Ent. Ord. Confirm. Sale to Richard Rand by Recvr. herein of certain Real Propt. known as Lot 9, Tract 12289, City of Pasadena, etc., with certain Exceptions therefrom, etc., & Auth. Receiver to pay Henry Morris Ullman 5% of Purchase Price as Brokerage Comm. & Directg. Recvr. upon Pymt. of Purchase Price to Deliver said Richard Rand, etc., a Deed thereto. Notif. Attys.

No. 13149.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Action Commenced in the United States District Court
for the Eastern District of New York, Entitled

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,
Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

APPELLANT'S OPENING BRIEF.

MARVIN OSBURN,

210 West Seventh Street,

Los Angeles 14, California,

Attorney for Appellant D. B. Salisbury.

FEB 12 1952

PAUL F. O'BRIEN
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IN THE
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In the Matter of the Action Commenced in the United States District Court
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UNITED STATES OF AMERICA,

Plaintiff,

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CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,
Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

1. The statutory provision giving the District Court jurisdiction of the cause is:

United States Code, Title 28, Sec. 1331.

2. Existence of the requisite jurisdictional facts are stated in the first paragraph [T. 3] of the order appointing Receiver made by the United States District Judge, United States District Court for the Eastern District of New York, wherein it is stated that Plaintiff United States filed herein a verified complaint for the foreclosure of Federal tax liens against the named Defendants pursuant to provisions of Section 3628 of the Internal Revenue Code.

3. Statutory provisions sustaining jurisdiction of the Court of Appeals as to this matter are: United States Code, Title 28, Sections 1291, 1292; Federal Rules of Civil Procedure 54(a). The appeal [T. 58] is taken from a final decision or order [T. 46] of August 31, 1951, purporting to vacate the order made August 13, 1951 [T. 30] and thus finally adjudicating the rights of Appellant as accepted bidder at the sale held on August 13, 1951. Likewise the appeal [T. 72] is taken from the final order dated October 25, 1951 [T. 70] directing the property be sold unless Appellant file a supersedeas bond by October 26, 1951, and is a final order as to the sale authorized for the same reasons above mentioned as to the order of August 31, 1951.

Statement of the Case.

This is an appeal from an order made August 30, 1951 [T. 46-48] and entered on August 31, 1951 [T. 98] purporting to vacate and set aside an order made by the Court at a judicial sale held August 13, 1951 [T. 30-31] and entered on August 13, 1951 [T. 97] ordering that certain real property be sold to Appellant D. B. Salisbury.

Appellant D. B. Salisbury was the successful bidder at the advertised public auction sale held on August 13, 1951, as to certain real property on Orange Grove Avenue, Pasadena, California. The Court acted as auctioneer at the sale held in the courtroom, accepted the bid of Appellant D. B. Salisbury, and ordered said property sold to D. B. Salisbury for \$60,110. [T. 31, 97.]

Plaintiff United States of America commenced this action in the United States District Court for the Eastern District of New York to foreclose Federal tax liens pursuant to Section 3678 of the Internal Revenue Code against De-

fendants Canadian American Company, Inc., and James Albert Wigmore. Joseph F. Ruggieri was appointed Receiver of certain assets of Defendants, including the Orange Grove Avenue property herein involved. [T. 3, 8.]

The District Court for the Eastern District of New York made an order on June 8, 1951, authorizing the Receiver to offer for sale and to sell, the Orange Grove Avenue property. [T. 8-13.]

The District Court for the Southern District of California made an order dated July 12, 1951 [T. 13, 15] directing that the Orange Grove Avenue property be sold on August 13, 1951, at public auction in Courtroom No. 6 in the United States Post Office and Courthouse Building at Los Angeles to the highest bidder or bidders [T. 13] and that the D. B. Salisbury offer in writing to purchase the property be considered at the auction. [T. 14.]

Appellant D. B. Salisbury made an offer in writing filed July 12, 1951, to purchase for \$60,110 from the Receiver, a parcel of real property, one of the assets of the Receiver, at 915-955-1003 Orange Grove Avenue, Pasadena, California. [T. 21-25; 17.]

Said order, dated July 12, 1951, was made upon Petition filed by the Receiver that said sale be held at public auction and that the bid of D. B. Salisbury of \$60,110 be considered by the Court at the sale to be held. [T. 15-18.]

Notice of the sale was published by the Receiver. [T. 97.] Said Notice, among other things, recited that D. B. Salisbury has offered to purchase said real property and pay therefor the sum of \$60,100. [T. 27.]

Pursuant to the July 12, 1951, order [T. 13-15] and Notice of Sale [T. 24-28] a public auction was held on

August 13, 1951, in said Courtroom, the Court itself called for bids, the Court accepted said bid of D. B. Salisbury and ordered said Orange Grove Avenue parcel of real property sold to Appellant D. B. Salisbury for \$60,110. [T. 30-31, 77.] Attorney for the Receiver was directed by the Court to draw a formal order. [T. 77.]

On August 16, 1951, the Receiver filed a motion in writing [T. 33-46] "to vacate and set aside the sale and any minute order made in connection therewith . . . on August 13, 1951 . . . to D. B. Salisbury" [T. 33.] The motion is based on the first ground, "because of mistake, inadvertence, surprise and excusable neglect the Receiver herein was deprived of giving consideration to and acting upon an offer to purchase said property by one Theodore J. Tictin. . . ."

Said motion to set aside the August 13, 1951, sale was also made on the ground "that the price at which said real property was authorized to be sold to D. B. Salisbury was grossly inadequate and grossly disproportionate to the market value of said real property" [T. 36.]

By an appraiser appointed by the Court at the request of the Receiver, the Orange Grove Avenue property was appraised at \$65,000. [T. 51.]

On August 15, 1951, two days after the sale to Appellant, said Tictin made an offer in writing to purchase said property at \$80,000 less commission. [T. 37-38.]

On August 30, 1951, the Court granted the motion of the Receiver "to vacate and set aside the sale and minute order of 8/13/51" and said motion was granted upon certain conditions. [T. 46.] The formal order was signed and entered on August 31, 1951. [T. 46-48, 98.]

Said August 31, 1951, order provided also that said property be sold at public auction and that the offer of \$80,000 of one Theodore J. Tictin for said property be considered at the sale. [T. 47.] Said order was made subject to certain conditions as to deposits and payments of commissions. [T. 47-48.]

Thereafter the Receiver made a motion for order requiring Appellant D. B. Salisbury to furnish and file supersedeas bond. [T. 61.] The Court on October 25, 1951, made an order, upon this motion of the Receiver, requiring Appellant D. B. Salisbury to furnish and file a supersedeas bond. [T. 70, 100.]

Appellant appeals from the August 31, 1951, order purporting to vacate the August 13, 1951 order. [T. 58.] Appellant also appeals from the October 26, 1951, order directing Appellant to file supersedeas bond and ordering that said property be sold pursuant to orders of Court if said bond be not filed. [T. 72, 70, 71.]

Apparently the "mistake" etc., referred to is the response of the Secretary of the Judge "that deponent was advised that the judge had just gone on the bench and that she could not communicate with the judge . . ." [T. 39.]

The affidavit of Tictin referred to in said motion of the Receiver, recites that affiant first learned of the sale on ". . . the morning of August 13, 1951, and that deponent then decided, to make a bid or such bids as may be necessary to acquire the property"; "That deponent was prepared to bid up to \$80,000.00 . . ." [T. 39-40.] The Tictin affidavit was made two days after the announced sale to Appellant at \$60,110. [T. 39-40.] The last published advertisement under Court order was on August 2, 1951, eleven days before the holding of the sale when Tictin telephoned as stated above. [T. 13-15.]

Specifications of Errors.

I.

The District Court erred in making the August 31, 1951, order vacating the August 13, 1951, order made by the Court itself and ignoring that the rights of Appellant as purchaser had become vested.

II.

In making said order, the Court erred by abusing its discretion in setting aside a judicial sale in the absence of gross inadequacy of price sufficient to shock the conscience of the Court and raise a presumption of fraud in the conduct of the sale.

III.

The Court erred in the making of said order by considering only that the price of Appellant was inadequate and without considering whether said inadequacy was sufficient to shock the conscience of the Court and raise a presumption of fraud in the conduct of the sale.

IV.

In making said order, the Court erred in determining that the price bid by Appellant was inadequate by using as a basis, a comparison between the accepted bid price with that of the subsequent bid offered.

V.

The Court erred in setting aside a judicial sale previously approved by the Court in the absence of fraud or unfairness in the conduct of the sale.

VI.

In setting aside said sale, the Court erred in not balancing the equities (presuming but not conceding, the stranger has the right to have the equities balanced or to be considered at all) between Appellant who made his bid in good faith at the invitation of the Court as against a stranger to the proceedings who failed because of his own infirmities to arrive at the sale at the advertised time and bases his purported claim upon a single telephone call, also too late. [T. 38-40.]

VII.

The lower Court erred in setting aside said August 13, 1951, sale by the August 31, 1951, order, by failing to consider that the sale made to Appellant had been made and confirmed by the Court itself; that the rights of Appellant as purchaser had become vested; and that the August 13, 1951, sale was not subject to a second approval by the Court. [T. 30.]

VIII.

The Court erred in making said October 25, 1951, order, by requiring and directing that Appellant furnish and file a supersedeas bond.

IX.

The Court erred in making said October 25, 1951, order because it conflicted with the prior August 13, 1951, order made by the Court.

X.

The Court erred in making said October 25, 1951, order with respect to that part thereof directing that a sale be made in accordance with orders heretofore or hereafter made in each separate respect, it is stated above that the Court erred in the making of the August 31, 1951, order.

Summary of Argument.

To set aside a judicial sale, made at a public auction upon the sole ground that a new "bidder" has appeared who offers more than the previously accepted bid, is an abuse of discretion. This is the law as to sales made subject to confirmation. As to sales made in the presence of the confirming power of the Court—when confirmation of the act of some officer of the court is not required, the rule is the same as that applicable to sales between individuals—fraud or equivalent wrongdoing must be shown. More is required to set aside a sale made by the Court, than a sale by an officer subject to Court approval.

It is not the law that a subsequent bidder may wait until the property has been struck off to another and then have the bidding reopened or even a sale set aside because the subsequent "bidder" makes an offer higher than the known accepted bid. The mere offer to pay more than the accepted bid is not grounds for setting aside a judicial sale.

Neither inadequacy of price alone nor gross inadequacy of price alone is ground for refusal to confirm a judicial sale. When the price bid is not only grossly inadequate but also so grossly inadequate as to give rise to a legal presumption of fraud, unfairness or mistake, a judicial sale may be set aside. To set aside a judicial sale otherwise, is an abuse of discretion.

In the instant situation, Appellant's bid price accepted by the Court is neither grossly inadequate nor inadequate upon standards recognized by law. The mere opinion expressed by the unqualified, a comparison made because one bid is

higher than the other, or the fact that "Johnnie-come-late" offers a higher price, are not recognized by law as the bases upon which to determine that a price is inadequate, grossly inadequate or that the sale was fraudulently or unfairly conducted.

The Court ordered set aside the sale made to Appellant on August 13, 1951, because the Court desired to obtain a higher price, offered after the accepted bid price of Appellant was known. The Court itself had already accepted the \$60,110 offer of Appellant and ordered the property sold to Appellant. As justification for setting aside the sale, the Court compared the \$60,110 bid by Appellant with the higher price offered by one Tictin in writing two days after the sale to Appellant. It is an abuse of discretion to find the price bid "inadequate" on this comparison with a subsequent bid basis. Therefore, there was no justification and it was an abuse of discretion (authorities herein cited) for the Court to make the August 31, 1951, order setting aside the August 13, 1951, sale to Appellant.

Affirmance of the Court order setting aside its own sale under the facts involved, means that anybody failing to get to the sale in time may have set aside the sale already made, and thereafter have considered, the "bid" of the delayed "bidder" made after the accepted bid price is known. These facts reveal a situation no different factually than that of the common situation wherein a subsequent offeror "bids" or offers a higher price after the amount of the accepted bid is known. This not uncommon situa-

tion is plainly within the rule that a judicial sale will not be set aside because thereafter a higher price is offered. Affirmance of the Court order in setting aside its own sale under these facts would penalize those who observe and comply with the Court's notice, accept the Court's published invitation and bid in good faith; affirmance will establish a special and inequitable advantageous procedure for those who fail to attend the publicized sale, fail to arrive in time or wait until bidding is frozen by acceptance and then make a higher offer. The highest bidder brought to the sale by the invitation of the Court has the right to expect the Court to abide by its judgment that the sale is made to the highest bidder. Whether the subsequent "bidder" "attempts" to communicate by telephone, climbs in the window or signs a firm offer two days after the sale, the situation is still one in which an offeror, after the announced sale at a price specified, makes a higher offer than that previously accepted by the Court.

The instant judicial sale did not require confirmation by the Court; the Court confirmed the sale when the court adopted the role of auctioneer and accepted Appellant's bid. The Court now by order made on motion attempts to vacate its prior order or judgment. Appellant upon acceptance of his bid by the Court itself gained a right which could be quashed only for cause recognized by law as a cause.

The Appeal From the Order Dated October 25, 1951.

This is also an appeal [T. 72] from the order [T. 70] made and entered October 25, 1951 [T. 71, 100] upon motion of the Receiver. The order, among other things, required Appellant to furnish by five o'clock the next day, a \$20,000 "supersedeas bond" (October 26, 1951) as a condition precedent to staying a sale for the purpose of Appellant prosecuting this appeal. The order further provided that if said bond be not filed within the time required that the sale of said property shall be made pursuant to orders of this Court "heretofore or hereafter made." The supersedeas bond was not filed [T. 94-101].

The order in authorizing the sale of said property pursuant to orders of the Court heretofore or hereafter made if the bond be not filed before five o'clock Friday, October 26, 1951, is in conflict with the order made on August 13, 1951, and therefore subject to invalidity upon the same grounds upon which this Appeal is urged as to the August 31, 1951, order.

Furthermore, the order is invalid because the matter of filing a supersedeas bond is a privilege to be exercised by Appellant if Appellant elects to exercise the privilege. Filing a supersedeas bond is not subject to mandatory direction requiring the Appellant to file such a bond. Also, Appellant has the right to file a supersedeas bond within the time permitted by law for the purposes for which supersedeas bonds are filed. It is submitted that the order and every part thereof made under date of October 25, 1951 [T. 70-71] is invalid.

ARGUMENT.

I.

Acceptance of Appellant's Bid by the Court at the Judicial Sale Held August 13, 1951, Gave Appellant Salisbury a Vested Right Recognized by Law of Which Appellant Cannot Be Deprived Without Cause Recognized as Sufficient as a Matter of Law. Both the Court and Appellant Became Bound by the Transaction. Appellant Became Subject to an Enforceable Contract.

A. The successful bidder at a judicial sale acquires a vested right not subject to deprivation except for cause:

"He acquires by acceptance of his bid, a vested right, sometimes called an equitable or inchoate title, which is recognized and enforced by law, and must be respected by the court, and which may not be disregarded or taken away from him except for sufficient legal or equitable reasons."

Blossom v. Milwaukee (1865), 3 Wall. 196, 18 L. Ed. 43.

"Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto . . ."

Pewabic Mining Co. v. Mason (1892), 145 U. S. 349, 356, 125 S. Ct. 887, 36 L. Ed. 732;

Quoted in *In re Stanley Engineering Corporation* (3d Cir. (1947), 164 F. 2d 316, 319.

“ . . . it is the right of one bidding in good faith, at an open and public sale, to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid . . . ”

Ballentyne v. Smith (1906), 205 U. S. 285, 289.

B. The binding effect in law of the acceptance of the bid is illustrated by the rule that the successful bidder at the judicial sale can be compelled to carry out his contract.

Camden v. Mayhew (1888), 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608;

Gordon v. Woods (1951), 1 Cir., 189 F. 2d 76;

In re Lane Lumber Co. (1913), 9 Cir., 207 Fed. 763, 766;

In re Jungman (1911), 2 Cir., 186 Fed. 302;

In re Rival Knitting Co. (1923), 2 Cir., 289 Fed. 960, 963;

In re Huguenot Pub. Co. (1936), 83 F. 2d 258;

Morrison v. Burnett (1907), 1 Cir., 154 Fed. 617.

C. And as to the Court:

“ . . . the court is as firmly bound in law and morals as any private citizen by his own executed sale.”

Files v. Brown (1903), 8 Cir., 124 Fed. 133, 138.

II.

Inadequacy of Price Alone, When There Is No Unfairness in the Conduct of the Sale, Is Not Ground Upon Which to Set Aside a Judicial Sale and Deprive Appellant of His Rights as Accepted Purchaser.

Comparison of Appellant's accepted bid with the offer subsequently made by one Tictin is not a permitted standard by which to determine adequacy of price. However, presuming the price to be inadequate on this unacceptable basis, it does not follow that the sale to Appellant can be set aside, in the absence of fraud or misconduct, without the Court abusing its exercise of discretion. Inadequacy of price alone is not grounds upon which a judicial sale may be set aside.

Ballentyne v. Smith (1906), 205 U. S. 285, 290;

Parker v. Commissioner of Internal Revenue (1948), 166 F. 2d 365;

In re Burr Mfg. & Supply Co. (1914), 2 Cir., 217 Fed. 16, 21;

Guaranty Trust Co. of N. Y. v. Williamsport Wire Rope Co. (1937), 2 Cir., 20 Fed. Supp. 634, 640.

The Court of Appeals, Third Circuit, reversed an order directing a resale to consider a \$20,000 bid received prior to confirmation of the \$17,000 bid previously accepted. The Court directed confirmation of the \$17,000 bid, pointing out that mere inadequacy of price was not sufficient ground to set aside a sale.

In re Metallic Specialty Mfg. Co. (1912), 3 Cir., 193 Fed. 300.

“ . . . something more than mere inadequacy of price must appear before the sale can be disturbed. . . . ”

Petwabic Mining Company v. Mason, supra.

III.

Judicial Sales Will Not Be Set Aside Unless: (a) There Was Fraud, Unfairness or Mistake in the Conduct of the Sale; or (b) The Price Brought at the Sale Was so Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake.

“ . . . now both in England and this country a sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience or unless there be additional circumstances against its fairness. . . . ”

Ballentyne v. Smith (1907), 205 U. S. 285, 290;

In re Stanley Engineering Corp. (1947), 3 Cir., 164 F. 2d 316, 319.

“The rule is well settled that a judicial sale regularly made in the manner prescribed by law, upon due notice, and without fraud, unfairness, surprise or mistake, will not generally be set aside or refused confirmation on account of mere inadequacy of price, however great, unless the inadequacy is so great as to shock the conscience and raise a presumption of fraud, unfairness or mistake. (Citing) *Spears Sand and Clay Works v. American Trust Co.* (C. C. A.) 52 F. 2d 831, 835. See, also, *Ballentyne v. Smith*, 205 U. S. 285, 27 S. Ct. 527, 51 L. Ed. 803; *Jackson v. Fuller*, 56 App. D. C. 239, 85 F. 2d 816; *Warner Bros. Pictures v. Lawton-Bryne-Buener Ins.*

Inc. (C. C. A.), 79 F. 2d 804; *Bovay v. Townsend* (C. C. A.), 78 F. 2d 343, 105 A. L. R. 359; *Bethlehem Steel Co. v. International Combustion Engine Corp.* (C. C. A.), 66 F. 2d 409.”

Guaranty Trust Co. of N. Y. v. Williamsport Wire Rope Co. (1937), 2 Cir., 20 Fed. Supp. 634, 640.

“The rule is that inadequacy of price, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court. The difference between \$6,250, for which the property was first sold, and \$7,500, for which the court was willing to sell on the resale, and the difference between the amount of the first sale and the amount of \$8,500, realized at the resale, does not show that gross inadequacy which warrants a resale. The cases which illustrate what is meant by inadequacy which shocks the conscience are cases where the difference in value was very much greater than the difference existing in this case. In *Lankford v. Jackson*, 21 Ala. 650, property worth \$1,000 was sold for \$6. In *Daly v. Ely*, 51 N. J. Eq. 104, 26 Atl. 263, property worth \$2,500 was sold for \$50. In *Hardin v. Smith*, 49 Tex. 420, property worth from \$2 to \$5 an acre was sold for 8¢ per acre. . . . The circumstances relied upon raise no presumption of fraud or unfairness.”

In re Burr Mfg. & Supply Co. (1914), 2 Cir., 217 Fed. 16, 21.

The Receiver petitioned and requested the Court to hold a public sale and that Appellant's bid of \$60,110 be considered at the sale [T. 15-18]. Notice of sale specifically mentioning Appellant's bid of \$60,110 was pub-

lished [T. 97] and also mailed to certain parties of record [T. 28-30].

The appraiser appointed by the Court appraised the property sold on August 13, 1951, as having a value of \$65,000 [T. 48-51]. Appellant bid \$60,110 and his bid was accepted [T. 30-31] at this price by the Court itself. All this establishes that the sale was fairly and properly conducted.

IV.

Finding That the Price Bid Is Inadequate Because of the Difference Between the Accepted Price Bid and a Subsequent Higher Offer Is an Abuse of Discretion. In Determining Adequacy of the Price the Court Must Consider Appraisalment of the Property as a Guide in the Exercise of Its Discretion.

“In determining whether gross inadequacy exists the bankruptcy court must take into consideration an appraisalment of the property as a guide in the exercise of its discretion in accordance with the intendment of the statute cited.”

In re Stanley Engineering Corp. (1947), 3 Cir.,
164 F. 2d 316.

In the case quoted above, the assets were appraised at \$50,000; the Appellant (Galman) bid \$57,250; after the sale, another bid \$63,250 which Appellant matched; the delayed bidder then offered \$67,250 and this the Court accepted, refusing to confirm the sale of Appellant therein. As to this erroneous ruling, the Court of Appeals, 3rd Circuit, said:

“makes it crystal clear that the . . . rejection of the Galman bid . . . and its acceptance of the higher bid

. . . was solely due to the court's desire to obtain
. . . the \$10,000 difference between the two bids."

p. 318

"had the court refused confirmation of the sale upon a finding of inadequate price, based upon the difference between the bids made and the bids proposed, it would have exercised a discretion of doubtful validity. *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16; *In re Metallic Specialty Co.*, 193 F. 300."

Jacobson v. Larkey (1917), 245 Fed. 538.

The record discloses that the lower Court considered the difference in the bids [T. 79] and actually considered the \$10,000 difference in the *Stanley* case in comparison with the \$20,000 herein [T. 79]. (The \$20,000 is not the net difference.) [T. 84-88.] In failing to consider the appraised value and in considering only the difference of the two bids, it is submitted the lower Court abused its exercise of discretion.

The record discloses that the lower Court considered the higher price offered and on the basis of this comparison and only on this basis, concluded the accepted price of Appellant was inadequate.

" . . . But the court may look at the difference in the bids to determine the value of the property." [T. 79.]

Setting aside a judicial sale on the above basis, it is submitted is a violation of the principles established by the authorities herein cited as an abuse of discretion in the exercise of the Court's discretion.

(It should be noted here that the District Court apparently presumed authorities then being considered [T. 79] could be distinguished "because the confirmation had

already taken place” thus overlooking the fact that the sale herein made also took place at the bar of the Court, was made by the Court itself and was not subject to Court approval.) [T. 73.]

The sale herein was final; confirmation by the Court of its own act was not required.

V.

A Subsequent Offer to Pay More Than the Price Previously Bid and Accepted Is Not Ground for Setting Aside a Judicial Sale and Depriving the Accepted Bidder of His Rights.

“After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid higher on resale. *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 A. 16; *In re Metallic Specialty Mfg. Co.*, D. C. 193 F. 300, *In re Shapiro*, D. C., 154 F. 673.”

In re Stanley Engineering Corp. (1947), *supra*;
Jacobson v. Larkey (1917), 245 Fed. 538.

“We recognize that except upon the extremest provocation courts will not upset a judicial sale at auction, upon the ground that a new bidder has appeared who offers more than the knock-down price. (Citing cases.) This unwillingness results from the effect upon such sales of knowing that a prospective bidder may abstain from bidding at the auction, may bide his time, and may then outbid the price at which the

property has been struck down. That possibility tends to chill bidding at the sale, to dispose of the property by later competition on successive bids, and thus to defeat the very purpose of an auction, which is to fetch together all those who may be interested to buy and to set them against each other with whatever stimulus that may provide, as opposed to other kinds of sale."

Knight v. Wertheim & Co., 2 Cir. (1946), 158 F. 2d 838.

"a sale . . . will not . . . be set aside for mere inadequacy of price unless such inadequacy is so gross as to fairly raise a presumption of fraud. The practice of opening biddings and setting aside sales made during the progress of judicial proceedings should not be encouraged, as it is not conducive to the interests of litigants and it tends to shake public confidence in the validity and finality of judicial sales, and to unduly prolong litigation. A purchaser at a judicial sale, who has complied with the terms thereof, or who shows his willingness and ability to do so, is not only entitled to the protection of the court but as a party to the proceedings, made such by his purchase, is so situated as to be entitled to the court's decree of confirmation, in the absence of inadequacy, fraud or mistake before alluded to."

Sturgiss v. Corbin (1905), 4 Cir., 141 Fed. 1.

In the instant situation, the Court considered the fact that the subsequent offer was higher. [T. 79.] The fact that a higher price was offered (after the accepted bid price was known) is not ground for setting aside a judicial sale, is not indicative of gross inadequacy of price and certainly is not indicative of fraud or an unfairly conducted sale.

VI.

Setting Aside a Judicial Sale in the Absence of Fraud, Unfairness or Mistake in the Conduct of the Sale or a Sale at a Price so Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake Is an Abuse in Errors of Legal Discretion, and Reversible Error.

“When the bankruptcy court failed to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion.”

In re Stanley Engineering Corp., p. 319, *supra*.

VII.

The Authorities Should Be Distinguished as to Their Application to a Sale Made Subject to Confirmation by the Court and a Sale Which Was Previously Made or Confirmed by the Court and as to Which the Court Thereafter Seeks to Vacate the Confirmed Sale. A Sale Made by the Court Itself May Be Vacated Only for Cause Recognized in Sales Between Private Individuals.

Because of the principles applicable, Appellant has heretofore cited authorities most of which involve sales made subject to confirmation by the Court. In these situations, the Court obviously has a power or discretion as to the sale yet to be confirmed not extant when the question of actually setting aside or quashing a sale previously made by the Court itself is involved. In the instant situation the sale on August 13, 1951, was made by the Court itself. The

point is, that the situation as to the Appellant is even stronger in the instant situation than those involved in the preceding authorities cited.

In the Matter of Burr Mfg. & Supply Co. (1914),
2 Cir., 217 Fed. 16;

Sturgiss v. Corbin (1905), 4 Cir., 141 Fed. 1.

VIII.

The Court Should Not Have Considered the Attempts of a Stranger to the Proceedings to Telephone the Court in Determining to Set Aside Its Own Judicial Sale Made to Appellant.

It is noted that the Court considered the attempt of a stranger to these proceedings—one Tictin—to communicate with the Court by telephone and his failure to do so, before the sale. [T. 39, 80.] Acceptance of this attempted communication will add a new ground for setting aside a judicial sale and will ignore and circumvent the plain rule that a judicial sale will not be set aside merely because a subsequent bidder offers a higher price. Acceptance of this attempted last minute telephone call, will also defeat and circumvent the rule as to stability of judicial sales. It should be noted that the Tictin affidavit [T. 38-40] does not state the time the phone call was made, the time at which the sale was held, where Tictin was at the time he made the call, why the subsequent bidder failed to arrive at the sale in time after making the phone call. [T. 38-40.] It should also be noted that said Tictin himself swears [T. 39] that he learned the time of the sale from the advertisement, of which the last was published under Court order on August 2, 1951, eleven days before Tictin telephoned the Court order the day of the sale on August 13, 1951. [T. 12-15.] Acceptance of this

attempted telephone call as ground for setting aside a judicial sale ignores the rights vested in the purchaser and ignores also that this was not a sale made subject to confirmation but was a sale made by the Court itself. Setting aside a sale accepted by the Court upon these facts does not balance the equities between the bona fide purchaser accepting the invitation of the Court and appearing at the Court on time and doing all that was expected of him as against one who not only fails to arrive at the sale on time because of his own infirmities but also seeks the special privilege of making and having his bid considered after the acceptance of the known bid of Appellant.

In a similar situation (*Pewabic Mining Co. v. Mason*), a telegram was sent on a Friday asking that the sale scheduled for Saturday be postponed because of religious reasons as to the absent would be bidder. The sale was not postponed although the telegram was received in ample time thereto. Thereafter the subsequent bidder offered \$20,000 more than the \$700,000 at which the property was sold at the scheduled sale which was subsequently increased to \$800,000 and as to this situation, the United States Supreme Court said:

“ . . . It is a singular fact that his first appearance in the case was the day before the sale, and his first appearance in court the day after confirmation. If it had all been planned, he could not have been more opportunely ignorant before and more accurately late afterwards. . . . ” (P. 366, 7.)

* * * * *

“ . . . it is enough that it comes too late. Surely no one would suppose that an officer having charge of the sale of property of such value, a sale made at the end of prolonged litigation, should at the last moment, in response to a dispatch from a stranger, postpone the sale. . . .” (P. 367.)

Pewabic Mining Company v. Mason (1892), 145 U. S. 349, 366, 367.

“Courts will not refuse to confirm a judicial sale or order a resale in the motion of an interested party, merely to protect him against the results of his own negligence”

Abbott v. Berle (1907), 80 N. E. 990, 992.

IX.

The Order Made August 31, 1951, and the Order Made October 25, 1951, From Which This Appeal Is Taken, Are Appealable Orders.

The August 31, 1951, order vacating the judicial sale made August 13, 1951, to Appellant, is a final determination of all rights of Appellant herein and is therefore a final decision. It is therefore an appealable order.

U. S. C. A., Title 28, Sec. 1291;

Federal Rules of Civil Procedure, 54(a).

Adjudication of a substantial right against a party in such manner as to leave no adequate relief except appeal, is an appealable order.

American Brake Shoe Foundry Co. v. N. Y. Rys. Co. (1922), 2 Cir., 282 Fed. 523.

That an order setting aside a judicial sale is a final decision and appealable when the order is “. . . and end to the proceedings as to the bidder's rights.”

Dikeman, et al. v. Jewel Gold Mining Co., et al.
(1924), 2 Cir., 2 F. 2d 665.

The order of August 31, 1951, was a “final decision” as to Appellant.

MacKinnon v. American Agar Co. (1934), 9 Cir.,
73 F. 2d 835;

Sturgiss v. Corbin, supra.

The order of October 25, 1951, is appealable for the same reasons the order of August 31, 1951, is appealable.

Conclusion.

The foregoing discussion and the matters set forth in the transcript considered in relation thereto, establish:

1. The public auction held at the judicial sale made on August 13, 1951, was fairly and properly conducted.
2. Appellant acquired a vested right or title as purchaser at said sale and both the Court and Appellant became subject to an enforceable contract of sale.
3. The sale on August 13, 1951, was made by the Court itself and further approval of the sale to Appellant by the Court was not required.
4. The sale on August 13, 1951, was made at an adequate price.
5. The sale price accepted by the Court on August 13, 1951, was neither grossly inadequate nor was there any fraud or other improper conduct involved.

6. The lower Court erred in making the August 31, 1951, order purporting to vacate the sale made on August 13, 1951, by comparing the subsequent bid offered with the accepted sale price as a basis for determining whether the sale price accepted on August 13, 1951, was adequate.

7. The Court erred in considering as a "mistake" the attempted and also late telephone call of one Tictin, in not accepting as final and determinative, the fact that no mistake occurred in the conduct of the sale, that no fact sufficient in law or equity, occurred to challenge the integrity of the sale, and that it is the Appellant and not the stranger here who is entitled to the protection of the Court.

8. The Court erred in making the order of August 31, 1951, setting aside the sale held on August 13, 1951, on the ground that a subsequent offer was made after the sale at a higher price.

9. The October 25, 1951, order requiring Appellant, among other things, to file a supersedeas bond was an invalid order in its entirety.

10. Appellant acquired all the rights of a purchaser at the August 13, 1951, sale and the records do not disclose any legal, equitable or factual ground justifying the Court in vacating on August 31, 1951, its own sale made to Appellant on August 13, 1951.

Therefore, the orders made on August 31, 1951 and on October 25, 1951, should be declared invalid and reversed.

Respectfully submitted,

MARVIN OSBURN,

Attorney for Appellant D. B. Salisbury.

No. 13149

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Action Commenced in the United States District Court
for the Eastern District of New York, Entitled

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,

Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

BRIEF OF APPELLEE.

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FILED

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FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff,

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CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,
Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

BRIEF OF APPELLEE.

Statement of Jurisdiction.

1. Statutory provision giving the District Court jurisdiction of the cause is:

United States Code, Title 28, Sec. 1331.

2. The requisite jurisdictional facts are set forth in the Order Appointing Receiver made by United States

District Judge, United States District Court for the Eastern District of New York, wherein it is set forth that plaintiff United States of America filed a verified complaint against the defendants pursuant to the provisions of Section 3678 of the Internal Revenue Code for the foreclosure of federal tax liens against the named defendants; that the Commissioner of Internal Revenue having filed his certificate pursuant to the provisions of Section 3678(d) of the Internal Revenue Code that the appointment of a receiver having the powers of a receiver in equity, is in the public interest. [Tr. 3-7.]

3. Statutory provisions as to jurisdiction of the Court of Appeals are: United States Code, Title 28, Section 1291 and Section 1292; Federal Rules of Civil Procedure 54(a). Appellee questions the jurisdiction of the court as to the issues presented by Appellant, as more particularly hereinafter set forth.

Statement of the Case.

In this proceeding the Appellee was appointed receiver of certain assets of defendants, which included property situated in the County of Los Angeles, State of California, belonging to certain of the defendants. [Tr. 3-7.]

Pursuant to said appointment, proceedings were taken [Tr. 8-12, 13-15] wherein certain real property situated in the City of Pasadena, County of Los Angeles, State of California, being the property known as 915-955-1003 Orange Grove Avenue, and being the property involved

in this appeal, was offered for sale by Appellee, as such receiver, at public auction after having received an offer from Appellant to purchase said real property for the sum of \$60,110.00. [Tr. 15-28.]

On the 13th day of August, 1951, a minute order was made in the United States District Court, Southern District of California, Central Division, approving the sale of said real property to Appellant for the sum of \$60,110.00. [Tr. 30-31.] No formal order was entered thereon.

On the 15th day of August, 1951, Appellee received an offer from one Theodore J. Ticktin, to purchase said real property for the sum of \$80,000.00. A motion was duly made by Appellee to set aside the minute order made on August 13, 1951. [Tr. 33-40.] The motion was granted and an order made and entered in said proceedings setting aside and vacating said minute order of August 13, 1951. [Tr. 46-48.]

Thereafter Appellee returned to Appellant, upon his demand the deposit of \$6,100 made by him with Appellee at the time he made his offer to purchase said property [Tr. 67]; that Appellee's check for said amount payable to Appellant was delivered to Appellant by Appellee on the 4th day of September, 1951, and thereafter on the 29th day of October, 1951, Appellant cashed said check and received the proceeds thereof. (Please see Motion to Dismiss made by Appellee, and Affidavit in connection therewith dated November 9, 1951.)

Appellant filed his notice of appeal from said order vacating and setting aside said minute order of August 13, 1951, on September 26, 1951 [Tr. 58], and thereafter filed his bond on appeal in the sum of \$250.00. [Tr. 99.] On October 17, 1951, Appellee filed a motion to require Appellant to file a supersedeas bond. [Tr. 61-70.] Said motion was granted on October 22, 1951 [Tr. 69-70], and an order was made and entered therein on the 25th day of October, 1951. [Tr. 70-71.] Appellant, on the 26th day of October, 1951, filed his notice of appeal [Tr. 72] appealing from said order requiring the filing of a supersedeas bond. Appellant has failed to file supersedeas bond and has failed to file cost bond in the sum of \$250.00.

With respect to Appellant's offer to purchase said real property said offer was in writing and required him to deposit with Appellee the sum of \$6,100.00, which sum was so deposited. Said offer [Tr. 21-24, Exhibit attached] provided in part as follows:

"This offer is made subject to the conveyance of good and sufficient title, seller to furnish customary policy of title insurance at a liability of \$60,110.00 showing property fee and clear of all encumbrances excepting general and special City and County taxes of the fiscal year 1951-1952 and conditions and restrictions of record, if any, as above provided.

"Taxes of the fiscal year 1951-1952 to be pro-rated and paid by the buyer from date of confirmation of sale.

"It is understood that this property is owned by Joseph F. Ruggieri, Receiver, in the matter of the

United States of America vs. Canadian American Co., Inc., *et al.*, and that the completion of this purchase is subject to the confirmation by the appropriate United States District Court, it being understood that you will take all necessary legal steps immediately to procure confirmation of sale at the earliest possible date.

“It is further agreed that in the event the title is not delivered to us by reason of failure of the Court to approve or by reason of the fact that some other purchaser shall have made a higher bid at a judicial sale or in accordance with the terms of any court order, or by reason of the unmarketable title, the obligation of the Receiver hereunder, or of the Offeror hereunder, shall both be cancelable and both shall be discharged of any liability on their part upon the return of the deposit made hereunder.

“Seller to furnish a contour survey by a licensed surveyor at his expense.

“If this offer is accepted, we shall take title in the names of D. B. Salisbury and Verne Salisbury, his wife, as joint tenants.

“It is a part of this offer that the completion of this sale and the delivery of the Title Policy of the subject property hereunder shall be completed on or before July 31st, 1951, or the deposit funds be returned to the offeror.”

Summary of Argument.

Appellee contends that the District Court was within its jurisdiction to set aside any order made by it upon the facts of the record and as presented to the court as such. The amount of the offer of Appellant, to wit, \$60,110.00, and that of Ticktin of \$80,000.00, is of considerable difference and the Court has the right and it is its duty to consider such fact. The issue of the difference in the amounts is not the only issue upon which the Court determined to set aside its approval of Appellant's offer. The Court had before it the affidavit of Ticktin, whose offer of \$80,000.00 was brought to the Court's attention. We are not confronted with the issue alone of whether the Court used discretion in setting aside an offer by reason of a larger offer being made, but have additional facts that were presented to the Court upon which the Court had a right to consider in exercising its discretion as to what justice warranted in the premises. The Court's comments at the time of its order made on August 13, 1951, with reference to Ticktin's phoning the Court's secretary, etc., appears sound and surely should be considered with reference to the issue here. [Rep. Tr., dated Aug. 30, 1951, pp. 3-6.]

The Court had a right to order Appellant to execute a supersedeas bond under the circumstances of this case. The factual situation being one where the Appellee could certainly sustain a loss in the event the order of the District Court was affirmed and the real estate involved in the proceeding would be opened to further order of sale,

wherein the public could have the opportunity to express itself as to what bid should be made for the property. The difference in the offer of the Appellant and of Ticktin of approximately \$20,000.00 was considerable and the District Court was only endeavoring to protect everyone's rights in the premises until the issue was determined.

**The Appeal From the Order Dated October 25, 1951,
Being Order Requiring Appellant to Furnish
\$20,000.00 Supersedeas Bond.**

Appellee believes the Court had authority to order Appellant to execute a supersedeas bond. The facts of the case warranted the Court in making an order protecting the rights of the parties. The law provides with reference to supersedeas bonds as follows:

Rule 62(d) and Rule 73(d) and (e), *Federal Rules of Civil Procedure*.

Appellee contends the order of the Court is not an appealable one.

U. S. C. A., Secs. 1291, 1292.

We have the additional rule when the affirmance or refusal of an order made in the course of a proceeding would make no difference in respect to the controversy on the merits, the Appellate Court will not determine whether or not it was decided erroneously.

Chicago Great Western Ry. Co. v. Beecher, 150
F. 2d 394, p. 398.

ARGUMENT.

I.

Appellant's Bid on the Proceedings Held August 13, 1951, Did Not Give the Appellant a Vested Right Recognized by Law. Neither the Appellant nor Appellee Became Subject to an Enforceable Contract.

In the case of *Butterfield v. Usher*, 91 S. Ct. Rep. 246-249, the facts appear to be quite similar to the issue presented here. In said case a decree was rendered in a suit in equity between one Johnson and Usher, directing a sale of certain lands, the property of Usher, on the 7th day of June, 1872. A sale of the property was made under said decree to one Butterfield, on September 30. The sale was reported to the Court on October 16, and on November 15 an order of confirmation was entered, unless cause to the contrary should be shown on or before December 10. Cause was not shown and thereupon on December 12 Butterfield paid the amount of his bid to the trustee, who made the sale, and received a deed to the property. An order was made ratifying and confirming the sale and approving the deed. On December 14 the order of December 12 was set aside on the petition of Usher and the court granted until December 21 to show cause against the confirmation. He appeared. On the 25th of January an order of confirmation was entered. From this order Usher appealed. On June 7 a decree was entered:

“Upon the offer of the defendant making an advance on the sale heretofore made, it is ordered, adjudged and decreed by the Court this seventh day of June, A. D., 1873, that the sale heretofore made

in this cause by Francis Miller, Esq., trustee, be, and the same is hereby vacated and set aside. And it is further ordered that the said trustee may proceed to advertise and resell the property, and that the expenses of the cause heretofore incurred may be paid out of the proceeds to be realized from the sale hereby directed to be made. And it is further ordered that the money in the hands of the trustee be paid back to the purchaser, with interest thereon at the rate of ten percent per annum, to be paid by the defendant Usher, and to be deducted by the trustee from the proceeds to come into his hands from the further sale hereby ordered. And it is further ordered that the trustee, in reselling the property, put up the same at a price not lower than the sum realized at the former sale, together with the sum of five hundred dollars advance offered by George W. Hauptman.”

Butterfield took an appeal from the decree and Usher alone appears as appellee. The court said:

“The decree here appealed from disposed finally of a motion made in the case, but not of the case itself. It simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a judgment of reversal with directions for a new trial or a new hearing, which, as has been often held, is not final. Where the practice allows appeals from interlocutory decrees, an appeal might lie from such a decree as this. Such was the practice in New York. 2 R. S. (N. Y.) 605, Secs. 78, 79; R. S. 178, Secs. 59, 62. Consequently it was said in *Delaplaine v. Lawrence*, 10 Paige 604, ‘In sales by masters, under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having

inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside; and, if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal.' But our jurisdiction upon appeal is statutory only. If some Act of Congress does not authorize a case to be brought here, we cannot take jurisdiction. Appeals cannot be taken to this court from the Supreme Court of the District, except after a final decree in the case by that court. The decree in this case not being final, we have no jurisdiction."

We believe the above case is clearly in point with the issue here. In the case at bar we have a third party, Appellant. In the case referred to Butterfield was a third party.

It should be recognized by this court that no formal order was ever entered with reference to the minute order made on August 13, 1951.

The Court in its ruling in setting aside the purported order made on August 13, 1951, fully set forth its views with respect thereto. [Rep. Tr. dated Aug. 30, 1951, pp. 3-13.] It should be recognized by this court also that in the case at bar there was no spirited bidding such as occurred in the case cited extensively by Appellant, *In re Stanley Engineering Corp.*, 164 F. 2d 316. There were no bids except the one of the Appellant upon his offer. The Court so commented at the time of the sale proceedings. [Rep. Tr., dated Aug. 13, 1951, pp. 2-5.]

In the case at bar an order was entered on September 21, 1951, ordering the sale of the property involved in this matter on the 29th day of October, 1951, at 10:00 o'clock A. M. [Tr. 52-58.]

The sale of the property (had it been held) was open to the public where everyone had an opportunity, including the Appellant here, to bid. This was contrary to the order made in the case cited, *In re Stanley Engineering Corp.*, 164 F. 2d 316.

II.

Inadequacy of Price Is a Factor to Be Considered for a Motion to Set Aside Sale Proceedings.

Appellee does not question the law as to the inadequacy of price alone in setting aside the sale. That law is well established and recognized by Appellee. Appellee does contend, however, that the inadequacy of the price alone is not the only issue here. We do have the additional issue of Ticktin's calling the District Court's secretary the morning of the sale [Tr. 38-40]; we do have the remarks of the District Court with reference to said call. [Rep. Tr., dated August 30, 1951, pp. 3-6.] Appellee also calls the court's attention to Rule 60(b)(6) of the *Federal Rules of Civil Procedure*.

III.

Judicial Sales Will Be Set Aside Where Unfairness Is Apparent or There Was a Mistake in the Conduct of the Sale.

Appellee again refers to his previous assertions that the difference in the bids amounting to \$20,000.00, together with the facts brought to the Court's attention arising out of Ticktin's phone call to the trial court's secretary and expressed in the Court's memorandum [Rep. Tr., dated Aug. 30, 1951, pp. 3-6], were sufficient facts to warrant the court in using its discretionary powers to set aside the sale proceedings.

IV.

There Was No Abuse of Discretion in Ordering the Sale Proceedings Set Aside.

Appellee contends the court did not abuse his discretion in ordering the purported sale set aside. As to what is discretionary is always a problem to determine in each factual situation and frequently causes considerable controversy. Appellee contends that the Court had discretionary authority to set aside the sale proceedings upon the facts presented to the Court. While the citation that is presented here does not pertain to a sale of property, we believe that the language used is solid and applies to any case where a higher court is passing upon a ruling of a lower court as to discretion. In *Delano v. Market St. Ry. Co.*, 124 F. 2d 965, 967 (9th Cir.), the Court said:

“In a second sense, and the one most commonly meant in the use of the word in the law, ‘discretion’ is defined as: ‘The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.’ 1 Bouv. Law Dict., Rawles’ Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set side on appeal except when there is an abuse of discretion. A common example is a court’s ruling on the extent of cross-examination. *Alford v. United States*, 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624. Discretion, in this sense is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discre-

tion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.”

V.

A Subsequent Offer to Pay More Than the Price Previously Bid Should Be Considered on Motion to Set Aside the Sale Proceedings.

Appellee recognizes the rule with reference to setting aside judicial sales. However, in the instant case the Court not only considered the fact that the offer of Ticktin was almost \$20,000.00, or one-third greater than that of Appellant, but also considered the fact that Ticktin had endeavored to communicate with the court in connection with making a higher bid. [Tr, 38-40; Rep. Tr., dated Aug. 30, 1951, pp. 3-6.]

VI.

Setting Aside a Judicial Sale Must Be Governed by the Facts in Each Individual Case.

In view of the increase in the bid of Ticktin and the factual situation with reference to his endeavor to make a higher bid, warranted the Court in using its sound discretion. It should be considered that there was no spirited bidding in the instant case and only one bid made, that being of the Appellant. The case of *In re Stanley Engineering Corp.*, 164 F. 2d 316, is different from the instant case, in that the court there determined only the issue of the increase of the bid, while here we have not only the increase of the bid, but also the additional fact that Ticktin, whose offer of \$80,000.00 was made on

August 15, 1951, endeavored to communicate with the court during the sale proceedings, as has heretofore been referred to in this brief, and is shown not only by the affidavit of Ticktin, but by the Court's remarks in setting aside the proceedings of August 13, 1951. There is also the distinction in that in the Stanley Engineering case there was no re-advertising, so that the public could have an opportunity to bid. In the instant case the Court set aside the sale proceedings and ordered a re-offering and re-advertising of the property for sale. [Rep. Tr., dated Aug. 30, 1951, p. 6; Tr. 46-48, 52-57.]

VII.

The Authorities Were Correctly Applied by the Court in Setting Aside the Sale Proceedings.

The fact that the Court had charge of the sale of the property, placed it in a position to determine and use its discretion whether the prior proceedings should be set aside upon the facts presented. We do not believe the Court's discretion should be disturbed in this matter.

VIII.

The Court Properly Considered the Attempts of a Prospective Purchaser to Present His Better Bid in Determining Motion to Set Aside the Sale Proceedings.

It was the Court's duty to consider any and all bids upon the property and Ticktin's endeavor to communicate with the Court, as set forth in his affidavit, and the Court's

comments with respect thereto in setting aside the proceedings, certainly show that the Court considered the situation in a fair and proper manner and as such used its discretionary authority in making the order complained of. Appellant states that Ticktin learned the time of the sale from the advertisement, of which the last was published under court order on August 2, 1951, eleven days before Ticktin phoned the Court, the date of the sale on August 13, 1951. The fact that the notice of sale was legally published, certainly did not prevent the advertising of the property in addition to the legal advertising. The Court had before it the case of *Pewabic Mining Co. v. Mason*, 145 U. S. 349, and other authorities, and considered same in setting aside the sale and ordering a republication. [Rep. Tr., dated Aug. 30, 1951, pp. 3-6.]

IX.

The Order Made August 31, 1951, and the Order Made October 25, 1951, From Which the Appeal Is Taken, Are Not Appealable Orders.

The order entered August 31, 1951, is not an appealable order and the court has no jurisdiction. (*Butterfield v. Usher*, 91 U. S. Supreme Court Rep. 246-249.)

The order of October 25, 1951, *re* supersedeas bond is not an appealable order.

U. S. C. A., Secs. 1291, 1292.

X.

The Cause Has Become Moot, in That (1) by the Terms of the Offer of Appellant Dated May 21, 1951, as Extended by His Letter Agreement Dated July 26, 1951, All Rights and Obligations of Appellant to Appellee and All Rights and Obligations of Appellee to Appellant Expired; (2) the Demand of the Appellant for the Return of His Deposit of \$6,100.00, the Return Thereof by Appellee to Appellant and the Acceptance by Appellant Thereof Constituted a Cancellation of the Offer of Purchase of Appellant and Terminated All Rights and Obligations of Appellant and Appellee Each to the Other.

The facts of the offer and obligations of the parties are set forth in full as exhibit attached to Petition for Order Authorizing Sale [Tr. 21] and again referred to in the affidavit in support of Receiver's Motion to Require Appellant to Furnish Supersedeas Bond. [Tr. 63-65.]

It is apparent from an examination of Appellant's offer that it was intended by him that unless the title to the property passed to him on or before August 31, 1951, he would not be bound to purchase the property. This did not occur. The property was not transferred and therefore under the specific provisions of his offer, to wit:

"It is further agreed that in the event the title is not delivered to us by reason of failure of the Court to approve or by reason of the fact that some other purchaser shall have made a higher bid at a judicial sale or in accordance with the terms of any Court order, or by reason of the unmarketable title, the obligation of the Receiver hereunder, or of the Offeror hereunder, shall both be cancelable and both shall be

discharged of any liability on their part upon the return of the deposit made hereunder.”

* * * * *

“It is a part of this offer that the completion of this sale and the delivery of the Title Policy of the subject property hereunder shall be completed on or before July 31st, 1951, or the deposit funds be returned to the Offeror.”

and the extension contained in his letter of July 16, 1951:

“Further in the event the court approves the sale of the subject property to us by midnight August 13th, we will allow a further period to midnight, August 31st, 1951, for completion of documentation and delivery of clear title.”

Appellant was no longer obligated to purchase the property and any obligation of Appellee was extinguished.

Appellant stood on his rights under the terms of his offer, and demanded the repayment of his deposit of \$6,100.00, which was returned to him by order of the Court.

This has been Appellant's position throughout this proceeding until this appeal and it will be noted, commencing page 10 of Reporter Transcript under date of August 30, 1951, by Mr. Brennan, Appellant's then counsel, the following:

“Mr. Brennan: I don't know whether your Honor is going on the assumption that \$60,000 is still there. Now, I don't know what Mr. Salisbury's position will be. There was a condition placed upon the bid, that the bid would have to be accepted within a period of time and the escrow closed. I think there was that limitation upon the bid that was put in there and I doubt if he could be held to the \$60,000 sale.

The Court: I don't intend to hold him. I intend this to be opened up on a new sale, and his \$6,100 can be returned.

Mr. Silverstein: We have the check to return."

This check was delivered to Appellant and cashed by him.

The authorities are manifold to the effect that this Court will not pass on a moot question.

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293;

Heilmuller v. Stokes, 256 U. S. 360, 65 L. Ed. 991;

Chicago Great Western Ry. Co. v. Beecher, 150 F. 2d 394;

Cover v. Schwartz, 133 F. 2d 541 at 546;

Lake Charles Metal Tr. Council, et al. v. Newport Industries, Inc., 181 F. 2d 820;

Brownlow v. Schwartz, 261 U. S. 216 at 217, 67 L. Ed. 621.

XI.

The Minute Order of the District Court Made August 13, 1951, Is Not Appealable, Hence the Appeal Taken Hereon to This Court by D. B. Salisbury on the 26th day of September, 1951, From the Order of the District Court Entered on the 31st Day of August, 1951, Vacating and Setting Aside Said Minute Order Is Not an Appealable Order.

This contention of Appellee needs no amplification.

See:

Butterfield v. Usher, supra.

Conclusion.

The orders made on August 31, 1951, and October 25, 1951, should be sustained.

Respectfully submitted,

JOSEPH JASPAN, and

LEO V. SILVERSTEIN,

Attorneys for Appellee.

No. 13149
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FOR THE NINTH CIRCUIT

In the Matter of the Action Commenced in the United States District Court
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Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

On Appeal From an Order Purporting to Vacate an Order
Made by the District Court at a Judicial Sale Direct-
ing That Certain Property Be Sold to Appellant
D. B. Salisbury.

APPELLANT'S REPLY BRIEF.

FILED

MAR 25 1952

MARVIN OSBURN, **PAUL P. O'BRIEN**
CLERK

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APPELLANT'S REPLY BRIEF.

A.

Appellee Avoids the Issue: That the August 31, 1951,
Order Vacating the Sale Made on August 13, 1951,
to Appellant Violates the Rule—That a Subse-
quent Offer to Pay a Higher Price Than the Pre-
viously Accepted Bid Is Not Grounds for Setting
Aside a Judicial Sale.

This appeal requests the Appellate Court to confirm
the sale made to Appellant on August 13, 1951, and to
vacate the August 31, 1951 order setting aside said sale.
(Also the October 22 order requiring Appellant to supply

a supersedeas bond.) [Tr. p. 69.] Appellant makes this request on the grounds that the District Court violated the rule that receipt of a higher offer than the previously accepted price is not grounds for setting aside a judicial sale. Appellee's brief fails to face up to the above proposition or to any of the rules corollary thereto. Appellee's brief is a series of categorical statements in bold face type stating the converse of the propositions of law set forth in Appellant's brief, followed by assertions unsupported by authority and a conclusion comprising a recital: (1) That the price offered after the sale by Tictin was higher than the accepted bid; or (2) a reference to Tictin's attempted telephone call to the judge. This same pattern, Appellee repeatedly follows in no less than at least five instances. (Resp. Br. pars. II, III, p. 11; pars. V, VI, p. 13, and pars. VI, VIII, p. 14.)

Appellee's brief is a series of denials, unsupported by authorities for the plain reason that the converse of the propositions of law in Appellant's brief are not supported by authorities. Having made these assertions conversely to Appellant's propositions of law, Appellee is forced to rest on the assertion of Appellee's assertions.

Analysis of Appellee's brief reveals APPELLEE'S POSITION to be this: the well established rule and the rules corollary thereto—that receipt of a higher offer subsequent to acceptance of the offered price at the judicial sale is not grounds for setting aside the sale, does not apply when a stranger (Tictin) not present at the sale attempts without success on the morning of the sale and a few minutes after the judge has gone on the bench, to communicate with the judge by telephone. Connected with this position are the repeated attempts in Appellee's brief to tie in some way or some how, Tictin's attempted telephone call as being part of the sale itself and that holding the sale as and when advertised is somehow unfair to Tictin because he was not there and that it would be fair to Appellant who, pursuant to the adver-

tised invitation, was present at the sale at the time advertised and in good faith made his bid, to have the sale to Appellant set aside at the behest of Tictin—allowing Tictin to second guess Appellant by a higher offer.

Appellee's position ignores: the above rule cited, the rights acquired by Appellant at the sale, the doctrine as to the stability of judicial sales and all the rules of law quoted in Appellant's brief supported by the numerous authorities cited—to none of which Appellee's brief offers any challenge.

B.

Appellee's Brief Contains Purported Statements of Fact Not Supported by the Record or Statements Sufficiently Inaccurate to Be Misleading.

1. These statements of Appellee are not supported by the record:

“ . . . a minute order was made . . . ”

“ . . . approving the sale.” (Resp. Br. p. 3.)

The District Court did not make, as Appellee states, a “minute order” and did not “approve” anything; in this situation there was no prior sale to approve; the District Court made its own acceptance of the offer of Appellant made at the judicial sale held in open court; the sale was made and ordered by the Court itself. [Tr. p. 31.] The Court “ordered that said property be sold to D. B. Salisbury . . .”. [Tr. pp. 31, 97.] As required by Federal Rule of Civil Procedure, Rule 79(a), a notation of the order made by the District Court on August 13, 1951 [Tr. p. 31], ordering the property sold to D. B. Salisbury was entered in the docket. [Tr. p. 97.]

2. This statement of Appellee is not correct:

“Appellant filed notice of appeal from said order vacating and setting aside said minute order of August 13, 1951 . . .”. (Resp. Br. p. 4.)

Appellant's Notice of Appeal states: "from the order and the whole thereof made by this Court on August 31, 1951 and dated, and filed and entered in this action August 31, 1951 vacating the order therein referred to made in this proceeding on August 13, 1951." [Tr. p. 58.]

3. This statement in Appellee's brief is not supported by the record:

" . . . thereafter Appellee returned to Appellant, upon his demand the deposit of \$6,100.00 made by him . . .". (Resp. Br. p. 3.)

This statement makes the fact appear to be that Appellant actually made demand for the deposit and this is not in accordance with the record; the matter is discussed hereinafter at length.

4. This statement in Appellee's brief may be misleading:

"With respect to Appellant's offer to purchase said real property said offer was in writing and required him to deposit with Appellee the sum of \$6,100.00." (Resp. Br. p. 4.)

This statement gives the erroneous impression that Appellant was obliged to make a \$6,100.00 deposit. There is no rule or law of this Court which requires a purchaser to make a deposit. Appellant voluntarily made the deposit.

5. The following statement in Appellee's brief may be misleading and may cast doubt in the mind of the Appellate Court as to a fact concerning which the Appellee himself should not have any doubt:

" . . . the fact that the sale was legally published, certainly did not prevent the advertising of the property in addition to the legal advertising." (Resp. Br. p. 15.)

It was pointed out in Appellant's brief that Tictin's affidavit as to his telephone call made at such time as did not

permit him to attend the sale referred to an advertisement from which he learned the time of the sale and that the record establishes the last publication of the legal advertisements was August 2, 1951, eleven days before Tictin attempted to telephone the judge on the morning of the sale. To above suggestion made by Appellee that *other* advertisements may exist, Appellant now points out that if there were other advertisements of this sale, surely Appellee himself would know about them and it would not be necessary to suggest the *possibility* of a fact as to which the Receiver should know either is or is not an *actuality*.

6. The following statement in Appellee's brief is subject to an easily accepted erroneous impression:

"We are not confronted with the issue alone of whether the court used discretion in setting aside an offer by reason of a larger offer being made, but have additional facts that were presented to the court upon which the court had a right to consider in exercising its discretion . . .". (Resp. Br. p. 6.)

The above statement gives the impression that there were some facts (more than one) in addition to the higher offer made after the sale to Appellant, additional to the attempted telephone call by Tictin. [Tr. pp. 78, 81.]

7. This statement in Appellee's brief is not clear:

"It should be recognized by this Court that no formal order was ever entered with reference to the minute order made on August 13, 1951." (Resp. Br. p. 10.)

The Appellate Court is left to guess its purpose.

The facts are: This is an appeal from the August 31, 1951, order and NOT from the August 13, 1951, order; the District Court did make an order—not a "minute order" as Appellee asserts—the District Court ordered the property sold to D. B. Salisbury [Tr. p. 31]; as

required by Federal Rule of Civil Procedure 79(a) a notation of the August 13, 1951, order was entered in the docket [Tr. p. 97]; and that Appellee's counsel himself was directed by the District Court to draw a "formal order" and this Appellee's counsel promised to do [Tr. pp. 31, 77, 97], and did not do:

" . . . The property is sold to D. B. Salisbury for \$60,110. A formal order should be drawn, Mr. Silverstein and submitted for signature.

Mr. Silverstein: Yes, your Honor." [Tr. p. 77.]

Apparently Appellee seeks to advantage his own omission and if that is not the object of Appellee, then why does Appellee twice refer to the "absence of a formal order" (Resp. Br. pp. 3, 10); Why refer to the August 13 order of sale at all. This is not an appeal from the August 13 order. The District Court recognized the finality of its own order made on August 13, 1951, and entered in the docket, by subsequently entertaining motions in regard thereto. Appellee himself recognized the August 13, 1951, order by motions in respect thereto.

A judgment is binding between parties although formal entry is not made.

Continental Oil v. Mulich (1934), 70 F. 2d 521.

New rules do not require formal written judgment.

Fed. Rules Civ. Proc., Rules 58, 79a;

Western Union v. De May (1939), 106 F. 2d 362.

C.

Appellee Offers No Authorities Applicable to Issues Herein in Support of Appellee's Contentions.

1. Appellee cites in all, eight decisions of which six (Resp. Br. p. 18) are valiantly offered in support of the elementary rule that an appellate court does not pass upon moot questions. Appellant is at a loss to understand why Appellee takes time here, to either mention the proposi-

tion or cite authorities in support of this unchallenged elementary general rule of law.

2. Of the remaining two decisions cited by Appellee, *Delano v. Market St. Ry.* is offered for its broad definition of "discretion" and Appellant again is left wondering why Appellee quotes this definition of considerable length because this part of the quotation (Resp. Br. p. 12) should have warned Appellee that the quoted definition did not apply to the problem herein involved:

" . . . the power exercised by courts to determine questions *to which no strict rule of law is applicable* . . . ". (Emphasis added.)

3. The other decision cited by Appellee does not support the proposition Appellee sets forth in bold face type (Resp. Br. p. 8) and under which Appellee quotes *Butterfield v. Usher*. This decision turns on the question of statutory jurisdiction as defined by the statute applicable to the District of Columbia; the decision is not relevant to the subject to vested rights acquired by a successful bidder at a judicial sale and is not authority for the contention that the order herein involved is not appealable. *Butterfield v. Usher* is misinterpreted by Appellee; the case supports and is not contrary to the position of Appellant. Appellant includes as the appendix herein a complete report of the opinion, with emphasis added.

4. Federal Rules of Civil Procedure, Rule 62(b) and Rule 73(d) and (e) do not support Appellee's contention that the District Court had authority to REQUIRE Appellant to execute a supersedeas bond. (Resp. Br. p. 7.) Appellant considered this question disposed of by the emphatic expression of The Appellate Court itself at the hearing at San Francisco November 26, 1951, on the Motion made by Appellee to dismiss these appeals.

D.

**Appellee's Brief Contains Assertions Not Supported
by the Record or Authorities.**

1. This assertion by Appellee is not supported:

" . . . the court has a right and it is its duty to consider such fact . . ." (that the offer of Appellant is \$60,110 and that of Tictin \$80,000 is of considerable difference). (Resp. Br. p. 6.)

The basis upon which the court has this asserted "right" and upon what basis the court has a "duty" to consider the difference in the bid of Appellant accepted by the court and the subsequent offer of a higher price made by Tictin Appellee leaves the Appellate Court and Appellant to guess. Appellee cites no authorities. The record establishes that this is what the District Court did do. [Tr. p. 79.] Appellant cited authorities holding that it is error for the court to consider difference in price alone or to disregard the appraised value (App. Br. pp. 17-20).

2. This statement in Appellee's brief is an unsupported assertion:

"The District Court was only endeavoring to protect everyone's rights in the premises until the issue was determined." (Resp. Br. p. 7.)

The rights of Appellant were being taken away and ignored by setting aside the August 13, 1951, sale by the order made on August 31, 1951, and the Court and the Receiver were proceeding on the presumption that a purchaser at a judicial sale does not acquire any rights.

3. Notwithstanding Appellee's asserted assurance "that this contention of Appellee needs no amplification" (Resp. Br. p. 18) considerable "amplification" is necessary. The contention that the August 13, 1951, order is not appealable or that the August 31, 1951, order is not appealable BECAUSE the August 13, 1951, order is not

appealable (Appellee's presumption asserted), is not supported by *Butterfield v. Usher* cited by Appellee. (Resp. Br. p. 18.)

Appellant reiterates the following facts deemed pivotable to this appeal and upon which are based the Specification of Errors. (App. Br. p. 6.)

1. On August 13, 1951, the District Court itself accepted the \$60,110.00 offer of, and ordered the property sold to D. B. Salisbury, Appellant herein.
2. On the morning of August 13, 1951, and after the judge had gone on the bench, Tictin attempted without success, to telephone the judge.
3. On August 15, 1951, two days after the sale made to Appellant and after the sale price was known, the affidavit of Tictin was filed, stating Tictin had intended on August 13, 1951, to make a bid. On August 15, Tictin in writing made a firm offer of \$80,000.00 for the property.
4. On August 31, 1951, the District Court ordered vacated, the August 13, 1951, sale to Appellant.

The grounds and the only "grounds" upon which the District Court on August 31, 1951, ordered vacated the August 13 judicial sale made to Appellant, is disclosed by the record to be 2 and 3 above. The sale to Appellant was set aside because of the higher offer later made and the attempted telephone call to the judge. [Tr. pp. 79-81.]

E.

Appellee's Argument Comprises a Series of Statements Converse to the Issues Set Forth in Appellant's Brief; Appellee Fails to Cite Authorities Which Sustain Any of Appellee's Contentions.

Hereinafter Appellant considers Appellee's contentions in the same order as presented by Appellee:

I.

Appellee Fails to Cite Authorities Sustaining Appellee's Contentions That Appellant Did Not Acquire as the Successful Bidder at the Judicial Sale, a Vested Right of Which Appellant Cannot Be Deprived Without Cause. *Butterfield v. Usher* Is Misinterpreted by Appellee and Does Not Sustain Appellee's Contention.

Appellee asserts:

"Appellant's Bid in the Proceedings Held August 13, 1951, Did Not Give the Appellant a Vested Right Recognized by Law. Neither the Appellant nor the Appellee Became Subject to an Enforceable Contract." (Resp. Br. p. 8.)

Above statement is converse to the proposition stated in Appellant's brief. (App. Br. p. 12.) Appellee ignores each and all authorities cited by Appellant. (App. Br. pp. 12-13.) Appellee cites *Butterfield v. Usher*. This decision does not sustain Appellee's contention. This case turns on the point of jurisdiction as defined by a particular statute and as the statute was interpreted by the court. This decision does not hold as Appellee contends—that an order improperly setting aside a sale, is not an appealable order. To the contrary, the Court points out that in the absence of the statute involved, the rule is that purchasers at judicial sales are regarded as having inchoate rights entitling them to take an appeal.

Because Appellee relies only upon *Butterfield v. Usher* and ignores the following authorities cited by Appellant holding that the accepted bidder at a judicial sale acquires contractual rights of which he cannot be divested without cause, the complete report of *Butterfield v. Usher* is set forth in the appendix hereto.

Blossom v. Milwaukee (1865), 3 Wall. 196, 18 L. Ed. 43;

Ballentyne v. Smith (1906), 205 U. S. 285, 289;
Camden v. Mayhew (1888), 129 U. S. 73, 9 S.
Ct. 246, 32 L. Ed. 608;

See additional cases cited Appellant's Brief, pages
12-13.

II.

**Appellee Fails to Offer Either Authority or Fact as
to Why the Rule That Inadequacy of Price Alone
Is Not Ground Upon Which to Set Aside a Ju-
dicial Sale, Does Not Apply to the Facts Herein
Involved.**

Appellee asserts:

“Inadequacy of Price Is a Fact to Be Considered
in a Motion to Set Aside Sale Proceedings.” (Resp.
p. 11.)

The contention of Appellee amounts to this: Conceding that inadequacy of price alone is not grounds for setting aside a judicial sale, nevertheless, contends Appellee, if the price is inadequate then this inadequacy of price may be considered if someone attempts to telephone without success on the morning of the sale and contact the judge. Appellee's argument presumes the attempted telephone call is part of the sale and that the price offered by Appellant and accepted by the Court is inadequate. The appraisal establishes that the price is adequate. [Tr. p. 48.] Appellee does not offer authorities challenging the following authorities cited by Appellant.

In re Burr Mfg. & Supply Co. (1914), 2 Cir. 217
Fed. 16, 21;

In re Metallic Specialty Mfg. Co. (1912), 3 Cir.
193 Fed. 300;

See additional authorities cited, Appellant's Brief,
page 14.

III.

Appellee Fails to Challenge Application of the Rule of Law Quoted by Appellant: Judicial Sales Will Not Be Set Aside Unless: (a) There Was Fraud, Unfairness or Mistake in the Conduct of the Sale; or (b) the Price Brought at the Sale Was So Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake.

Appellee asserts:

“Judicial Sales Will Be Set Aside Where Unfairness Is Apparent or There Was a Mistake in the Conduct of the Sale.” (Resp. Br. p. 11.)

Why consume time of the Appellate Court or Appellant by asserting in bold face type, this unquestioned postulate if not shown to be applicable to the facts involved or no bona fide attempt is made to show application of the rule. Appellee does not point out or make any attempt to point out (1) unfairness (apparent or otherwise) or (2) mistake, IN THE CONDUCT of the sale.

Following the above, Appellee follows Appellee's pattern followed throughout his reply brief: Assert: (1) reference to the increased offer made after the sale; and (2) the attempt of Tictin to telephone the judge.

Appellee ignores the working rules and illustrations offered to determine unfairness IN THE CONDUCT of the sale, quoted in the following decisions:

Guaranty Trust Co. of N. Y. v. Williamsport Wire Rope Co. (1937), 2 Cir., 20 Fed. Supp. 634, 640;

See additional citations (App. Br., pp. 15-16).

IV.

Appellee Avoids the Rule Quoted in Appellant's Brief:

"Finding That the Price Bid Is Inadequate Because of the Difference Between the Accepted Price Bid and a Subsequent Higher Offer Is an Abuse of Discretion. In Determining Adequacy of the Price the Court Must Consider Appraisalment of the Property as a Guide in the Exercise of Its Discretion."

In response to the above rules of law advanced by Appellant (App. Br. p. 17), Appellee asserts:

"There Was No Abuse of Discretion in Ordering the Sale Proceedings Set Aside." (Resp. Br. p. 12.)

Appellee's assertion is directed to the above rule quoted in Appellant's brief and in avoidance of authorities cited by Appellant (App. Br. pp. 17-18) offering illustrations and the rule as to appraisalment to consider in determining inadequacy of price. Appellee cites *Delano v. Market St. Ry. Co.*, quoting therefrom a broad definition of "discretion" which, as heretofore pointed out, should have been sufficient to warn Appellee that the broad definition quoted does not apply to the facts involved herein because this broad definition of discretion applies when no strict rule of law is available. On this subject Appellant cites the rules supported by numerous authorities that the court should consider: (a) whether or not the price is so grossly inadequate as to shock the conscience of the court so as to raise a presumption of fraud or unfairness; (b) that the court is not permitted to consider merely the difference between the accepted bid and a higher offer later made; and (c) it is abuse of discretion if the court does not consider the appraised value. In the instant situation the appraised value approximated Appellant's bid accepted by the court [Tr. p. 48], and the record establishes that the District Court considered as grounds for

setting aside the sale made on August 13, 1951, the difference between the accepted bid price and the subsequently made higher offer. [Tr. p. 79.] The District Court did the very thing denounced by the above rules of law supported by the authorities cited by Appellant and which Appellee does not mention. The Court looked at the comparison in the bid price and the subsequent offer made and ignored the appraisal. The District Court did this:

“In speaking of a price which is grossly inadequate, the courts are referring to the value of the property and not the differences in the price bid. But the court may look at the difference in the bids to determine the value of the property.” [Tr. p. 79.]

In lieu of Appellee's asserted assurance that “There was no abuse of discretion . . .” Appellant offers the above quoted rules of law as to what is an abuse of discretion upheld by:

In re Stanley Engineering Corp. (1947), 3 Cir.,
164 F. 2d 316;

Jacobson v. Larkey (1917), 245 Fed. 538.

V.

Appellee Avoids the Rule Quoted by Appellant: A Subsequent Offer to Pay More Than the Price Previously Bid and Accepted Is Not Ground for Setting Aside a Judicial Sale and Depriving the Accepted Bidder of His Rights.

Appellee asserts:

“A Subsequent Offer to Pay More Than the Price Previously Bid Should Be Considered on Motion to Set Aside a Sale Proceeding.” (Resp. Br. p. 13.)

Appellee makes no attempt to support his assertion, announces that Appellee “recognizes the rule with reference to setting aside judicial sales” and follows Appellee's

pattern followed throughout his reply brief: assert the converse of Appellant's proposition and close with: (1) assert the increased offer made after the sale; and (2) refer to Tictin's attempted telephone call to the judge and thus ignore Appellant's authorities:

In re Stanley Engineering Corp. (1947), *supra*;

Jacobson v. Larkey, *supra*;

Knight v. Wertheim & Co., 2 Cir. (1946), 158 F. 2d 838.

VI.

Appellee Avoids: The Rule of Law Quoted by Appellant: Setting Aside a Judicial Sale in the Absence of Fraud, Unfairness or Mistake in the Conduct of the Sale or a Sale at a Price so Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake Is an Abuse in Exercise of Legal Discretion, and Reversible Error.

Appellee asserts:

"Setting Aside a Judicial Sale Must Be Governed by the Facts in Each Individual Case." (Resp. Br. p. 13.)

Appellant concedes the facts in every case must determine the rule applicable.

Appellee contends *In re Stanley Engineering Corp.*, *supra*, cited by Appellant, "determined only the issue of the increase of the bid" (Resp. Br. p. 13); Appellee then refers to Tictin's telephone call as though it were part of the sale itself.

Appellee's statement that, in the *Stanley* case, only the issue of the difference between the bid and subsequent offer was considered (Resp. Br. p. 13) is not the fact. The *Stanley* case plainly holds that it is reversible error

to consider only the difference between the accepted bid and the higher offer made later. Herein an appraisal had been made and in the *Stanley* case an appraisal was considered:

“In determining whether gross inadequacy exists the bankruptcy court must take into consideration appraisement of the property as a guide in the exercise of its discretion . . .” (P. 318.)

In re Stanley Engineering Corp., supra.

In the instant situation, the District Court did what is denounced in the *Stanley* case: ignored the appraisal and considered difference between the accepted bid and the higher offer made two days later. [Tr. p. 79.]

VII.

Appellee Makes No Attempt to Meet the Cited Authorities Which Distinguish Between Sales Subject to Confirmation and Sales Made by the Court Itself Requiring in the Latter Situation the Same Grounds Required to Set Aside Sales Between Individuals.

Appellee asserts:

“The Authorities Were Correctly Applied by the Court in Setting Aside the Sale Proceedings.” (Resp. Br. p. 14.)

In support of this assertion, Appellee offers this:

“We do not believe the Court’s discretion should be disturbed in this matter.” (Resp. Br. p. 14.)

Notwithstanding this assurance, in support of the above rule Appellant offers the following citations ignored by Appellee:

In the Matter of the Burr Mfg. Co. (1914), 2 Cir., 217 Fed. 16;

Sturgiss v. Corbin (1905), 4 Cir., 141 Fed. 1.

VIII.

The Court Should Not Have Considered the Attempt Without Success to Telephone the Judge on the Morning of the Sale in Vacating the Sale Previously Made to Appellant.

Appellee asserts:

“The Court Properly Considered the Attempts of a Prospective Purchaser to Present His Better Bid in Determining the Motion to Set Aside the Sale Proceedings.” (Resp. Br. p. 14.)

It was the Court's duty to consider all “bids” but Tictin to whom Appellee refers as though Tictin made a “bid” did not make a “bid.” Tictin made a firm offer for the first time two days after the sale and when the accepted bid price of Appellant was known.

If judicial sales are to be set aside because of last minute unsuccessful telephone calls, then those decisions cited in Appellant's brief, ignored by Appellee, must be set aside. Appellant refers to the rules quoted to the effect: the buyer at a judicial sale acquires a vested right; the Court is as firmly bound in law and morals as any private citizen by his own executed sale; the circumstances must raise a presumption of fraud or unfairness; and courts will not refuse to confirm a sale merely to protect someone against the results of his own negligence.

IX.

Appellee Does Not Offer Any Authorities Contrary to Those Cited by Appellant in Support of Appellant's Statement: That the Order Made August 31, 1951, and the Order Made October 25, 1951, Are Appealable Orders.

Appellant does not desire to add anything to that which is said in support of the above proposition in Appellant's brief (App. Br. pp. 24-25) and respectfully directs the

attention of the Appellate Court to the cases therein cited. In addition to the reference to the order made on October 25, 1951, requiring Appellant to furnish a *superseas* bond, Appellant directs the attention of the Court to the other provision in said order providing that unless said *superseas* bond is supplied by Appellant, the sale will be held, etc.

Butterfield v. Usher cited here by Appellee does not sustain the contention of Appellee that the orders are not appealable and to the contrary, upholds the rule set forth in Appellant's brief sustained by authorities cited, that an order when it is a final determination of the rights of a purchaser at a judicial sale, is an appealable order.

X.

Appellee's Contention That the Order Entered August 31, 1951, Is Not Appealable Because the Order Made August 13, 1951, Is Not Appealable, Is Not Supported by Law or the Citation Given by Appellee.

Notwithstanding Appellee's assurance "this contention of Appellee needs no amplification," the above assertions certainly do need amplification. First, let it be noted that *Butterfield v. Usher* cited by Appellee does not support any of the contentions Appellee above makes and as heretofore pointed out, this case has been misread by Appellee.

It is pointless for Appellee to assert here that the August 13, 1951, order is not appealable. This is not an appeal from the August 13, 1951, order. The appeal here is taken from the August 31, 1951, order and also the October 22nd order.

Whether or not the August 31, 1951, order is appealable is not dependent on whether or not the August 13, 1951, order is appealable.

In re Schulte-United (1932), 59 F. 2d 553.

The August 31, 1951, order is appealable because as to Appellant it is a final determination of the rights of Appellant and if allowed to stand puts an end to the proceeding as to the rights acquired by Appellant as the accepted bidder.

U. S. C. A., Title 28, Sec. 1291;

Federal Rules of Civil Procedure, 54(a);

American Brake Shoe Foundry Co. v. N. Y. Rys. Co. (1922), 2 Cir., 282 Fed. 523;

Sikeman, et al. v. Jewel Gold Mining Co., et al. (1924), 2 Cir., 2 F. 2d 665;

McKinnon v. American Agar Co. (1934), 9 Cir., 73 F. 2d 835;

Sturgiss v. Corbin, supra.

F.

Appellee's Contention That the Cause for Appeal Is Moot Because Title Was Not Conveyed Prior to Close of August 31, 1951, Is Not Supported by Law or Fact. Appellee's Claim That Appellant Demanded Return of the Deposit Is Not the Fact.

Appellee, repeatedly throughout his brief, contended that Appellant had not acquired vested rights at the judicial sale held August 13, 1951; now in furtherance of Appellee's scraping around to bolster his contention that the appeal has become moot, Appellee admits Appellant did acquire rights by asserting in bold face type "All rights and obligations of Appellant to Appellee and of Appellee to Appellant expired." (Resp. Br. p. 16.)

Appellee's contention presumes the provision in Appellant's letter was intended for the benefit of Appellee and not for the benefit of Appellant.

Appellee presumes without support of facts in the record: that the provision as to the availability of the documents of title is a condition subsequent terminating the agreement as to the sale itself; that this condition

for the benefit of Appellant, could not be waived by Appellant; and that the agreement provided that time was of the essence.

Appellee overlooks: that it was the Appellee who on August 16, 1951, made a motion to set aside the sale made to Appellant; that the motion of Appellee to set aside the sale to Appellant was heard on August 26, 1951, taken under advisement and that the District Court on August 30, 1951, announced its decision [Tr. p. 78] and the elementary rule of law that one cannot advantage to himself his failure to perform a contract condition. Does Appellee infer that it lay within Appellant's power to acquire the documents prior to August 31, 1951, and that Appellee having moved to vacate the sale and the Court having ordered the sale vacated, that Appellee would have delivered the documents on demand?

This statement of Appellee is not supported by the record:

“ . . . thereafter Appellee returned to Appellant, upon his demand the deposit of \$6,110 made by him . . . ”. (Resp. Br. p. 3.)

Appellee's assertion makes the fact appear to be: that Appellant actually did demand return of the deposit; that Appellee Receiver returned the deposit because Appellant demanded the deposit. Appellant did not demand return of the \$6,100 deposit; Appellee returned the deposit to Appellant because the Court ordered its return [Tr. p. 48] and without demand from Appellant.

The record does not support Appellee's assertion: (1) on August 31, 1951, the District Court made an order “ . . . (5) that the Receiver shall return to D. B. Salisbury the sum of \$6,100 heretofore deposited with the receiver by said D. B. Salisbury . . . ” [Tr. p. 48]; (2) to bolster Appellee's assertion that Appellee demanded return of his deposit, Appellee on page 3 of his brief

refers to page 67 of the transcript and page 67 of the transcript is a copy of Appellee counsel's affidavit—Leo V. Silverstein, asserting "That on the 4th day of September, 1951, the receiver returned to D. B. Salisbury upon his demand the sum of \$6,110 . . .". [Tr. p. 67.] Even this is not a statement of fact but is made in the form of a conclusion. The ultimate fact as to when, where, to whom or how Appellant "demanded" return of his deposit is not stated any place in the record; (3) before the Court made the order vacating the August 13, 1951, order making the sale to Appellant, Appellee's counsel announced on **August 30, 1951**, "we have the check to return" [Tr. p. 85]; (4) on **September 4th** Appellee sent Appellant a check dated August 9, 1951, payable to D. B. Salisbury in the sum of \$6,110 (see Motion of Appellee to Dismiss Appeals, affidavit of Leo V. Silverstein attached). (See Motion to Dismiss by Appellee accompanied by Affidavit of Leo V. Silverstein the Motion being dated November 9, 1951, the affidavit including a photostat of the check dated August 9, 1951.)

Neither the law nor any rule of the District Court requires the purchaser at a judicial sale to make a deposit; Appellant herein made the deposit voluntarily.

It ought not be necessary to here point out that the colloquy with counsel as quoted on page 17 of Appellee's brief refers to events occurring after the Court had announced its decision and that counsel himself said he could not state the position of his client. Appellee reads into the colloquy a meaning obviously not intended. If Appellee were correct, this colloquy as of that date would not be material to the issues herein. The August 31, 1951, order directed return of the deposit and the order is the reason Appellee returned the deposit on September 4th.

Respectfully submitted,

MARVIN OSBURN,

Attorney for Appellant D. B. Salisbury.

APPENDIX.

Butterfield v. Usher, 91 U. S. (1875) 246.

Where the Supreme Court of the District of Columbia, at the general term thereof, rendered a decree vacating and setting aside a judicial sale of lands which had been confirmed by an order of the special term of said court, and directing a resale of them, *Held*, that the decree was not final, and that no appeal would lie therefrom to this court. [Headnote.]

Appeal from the Supreme Court of the District of Columbia.

On the 7th June, 1872, a decree was rendered by the Supreme Court of the District of Columbia in a suit in equity between Horace S. Johnston, plaintiff, and George Usher, defendant, directing a sale of certain lands, the property of Usher. In pursuance of this decree, a sale of the property was made to John W. Butterfield on the 30th of September. This sale was reported to the court Oct. 16; and on the 15th November an order of confirmation was entered, unless cause to the contrary should be shown on or before Dec. 10. Cause was not shown by the time limited; and thereupon, on the 12th December, Butterfield paid the amount of his bid to the trustee who made the sale, and receive from him a deed of the property. Previous to this time, there had been no order of the court directing a conveyance; but on that day the trustee reported to the court that he had received the purchase-money, and executed the deed; and thereupon an order was entered, ratifying and confirming the sale and approving the deed. This deed was left for record in the land records of the District on the day of its execution.

On the 14th December, and during the same term of the court, the order of Dec. 12 was set aside on the petition of Usher, and leave granted him until Dec. 21 to show cause against the confirmation. At the appointed time he did appear, and made his showing; but on the 25th January an order of confirmation was again entered. From this order Usher appealed to the general term, where, on the 7th June, the following decree was entered:

“Upon the offer of the defendant making an advance on the sale heretofore made, it is ordered, adjudged, and decreed by the court, this seventh day of June, A. D. 1873, that the sale heretofore made in this cause by Francis Miller. Esq., trustee, be, and the same is hereby, vacated and set aside. And it is further ordered that the said trustee may proceed to advertise and resell the property, and that the expenses of the cause heretofore incurred may be paid out of the proceeds to be realized from the sale hereby directed to be made. And it is further ordered that the money in the hands of the trustee be paid back to the purchaser, with interest thereon at the rate of ten per cent per annum, to be paid by the defendant Usher, and to be deducted by the trustee from the proceeds to come into his hands from the further sale hereby ordered. And it is further ordered that the trustee, in reselling the property, put up the same at a price not lower than the sum realized at the former sale, together with the sum of five hundred dollars advance offered by George W. Mauphtman.”

From this decree Butterfield has taken this appeal. He alone appears as appellant, and Usher alone as appellee.

An appeal lies to this court from the *final* decree of the Supreme Court of the District of Columbia in any case where the matter in dispute exceeds the sum of one thousand dollars. Rev. Stat. sect. 705.

“In case of the sale of things, real or personal, under a decree in equity, the decree confirming the sale shall divest the right, title, or interest sold, out of the former owner, party to the suit, and vest it in the purchaser, without any conveyance by the officer or agent of the court conducting the sale; and the decree shall be notice to all the world of this transfer of title when a copy thereof shall be registered among the land records of the district; but the court may, nevertheless, order its officer or agent to make a conveyance, if that mode be deemed preferable in particular cases.” Rev. Stat. relating to the Dis. of Col., sect. 793.

Mr. Enoch Totten for the appellant, and Mr. Richard T. Merrick for the appellee.

Mr. Chief Justice Waite delivered the opinion of the court.

The decree here appealed from disposed finally of a motion made in the case, but not of the case itself. It simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a reversal with directions for a new trial or a new hearing, which, as has often been held, is not final. **Where the practice allows appeals from interlocutory decrees, and appeal might lie from such a decree as this.** Such was the practice, in New York, 2 Rev. Stat. (N. Y.) 605, sects. 78, 79; *id.* 178, sects. 59, 62. Consequently it was said, in *Deleplaine v Lawrence*, 10 Paige, 604, “*In sales by masters, under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside; and, if the court errs*

by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal." But our jurisdiction upon appeal is statutory only. If some act of Congress does not authorize a case to be brought here, we cannot take jurisdiction. Appeals cannot be taken to this court from the Supreme Court of the District, except after a final decree in the case by that court. The decree in this case not being final, we have no jurisdiction.

We do not wish to be understood as holding that a purchaser at a sale under a decree in equity may not, at proper stage of the case, appeal from a decree affecting his interests. All we do decide is, that there cannot be such an appeal to this court until the proceedings for the sale under the original decree are ended.

In *Blossom v. R. R. Co.*, 1 Wall. 655, and 3 id. 196, we entertained such an appeal; but the decree there appealed from was final. There was no order to resell, for the reason, that, between the time of Blossom's bid and the time of the order of the court appealed from, the decree for the satisfaction of which the sale had been ordered was paid. The decree against Blossom, therefore, was the last which the court could make in the case. It ended the proceedings, and dismissed the parties from further attendance upon the court for any purpose connected with that action.

This appeal is, therefore, dismissed for want of jurisdiction. (Emphasis added.)

No. 13153

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of May Florence Waechter, De-
ceased,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Northern Division.

FILED

JAN - 1 1952

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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JOSEPH J. LANZA,

Attorneys for Appellees,

918 Joseph Vance Building,

Seattle 1, Washington.

In the United States District Court for the Western
District of Washington, Northern Division

No. 2513

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of MAY FLORENCE WAECH-
TER, Deceased,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For cause of action, plaintiffs allege:

I.

That plaintiffs are now and at all times herein-
after mentioned, were the duly appointed, acting
and qualified executors of the estate of May Flor-
ence Waechter, deceased, and are residents in the
Western judicial district of the State of Washing-
ton.

II.

That this is a civil action against the United
States of America for the recovery of internal reve-
nue taxes which have been erroneously and illegally
assessed and collected as an estate tax by the Col-
lector of Internal Revenue at Tacoma, Washington;
that the amount of claim involved herein does not
exceed \$10,000.00; and this Court has jurisdiction

of the subject matter of this action under Judicial Code Section 24, as Amended, and U.S.C.A. Title 28, §1340 and 1346.

III.

The death of May Florence Waechter occurred on February 20, 1947, while she was a resident of Seattle, King County, Washington.

IV.

Plaintiffs were appointed co-executors of the Will and estate of said May Florence Waechter by order entered on the 4th day of April, 1947, by the Superior Court of the State of Washington in and for King County; and at all times since have continued to be and act as the fully authorized executors of the said Will and estate.

V.

On March 19, 1948, plaintiffs acting as such executors, filed with the Collector of Internal Revenue, at Tacoma, Washington, the estate tax return on behalf of said estate of May Florence Waechter, deceased. That there was included in said return as part of the gross estate of decedent one-half the cash surrender value of the following insurance policies which were all carried upon the life of Henry Waechter, the surviving spouse, and are identified as follows:

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waechter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00
Total Cash Surrender Value.....					\$21,284.75

VI.

Said policies were taken out during the married life of the insured and decedent, and all premiums thereon were paid entirely from community funds down to the date of Mrs. Waechter's death, and on that date the policies were in full force and effect. None of the policies have been surrendered and none of the beneficiaries of decedent's estate or the surviving spouse have received any payments on account of the cash surrender value thereof at the date of decedent's death. Said insurance was not on the life of the decedent wife, and since none of the amounts here involved have been received by the executors or any heir or beneficiary of the decedent, no part of the cash surrender value thereof is includable as part of the gross estate of decedent for federal estate tax purposes.

VII.

By including one-half of the cash surrender value of said policies as part of the gross estate of decedent, the total tax assessed amounted to \$2,530.60 to which there was added and collected \$110.58 on account of interest, making a total of \$2,641.24 which was paid by the executors herein. By excluding one-half of the cash surrender value of said policies amounting to \$10,642.38 the correct tax should have been \$1,160.57 plus interest of \$21.34 making a total of \$1,181.91. That the difference between the amount paid and the correct amount of the tax is \$1,459.33.

VIII.

On August 24, 1949, plaintiffs, as such executors, filed with the Collector of Internal Revenue at Tacoma, Washington, their claim for refund of the portion of the tax so paid, and a copy of said claim is attached hereto marked Exhibit A and by this reference made a part hereof as if fully set forth herein.

IX.

That although more than six months have fully elapsed since the filing of said claim for refund, the Commissioner of Internal Revenue has neither allowed or disallowed said claim, although under date of March 2nd, 1950, the Internal Revenue Agent in charge at Seattle, Washington, notified plaintiffs, in writing, that a recommendation would be made to the Commissioner of Internal Revenue that said claim be disallowed.

X.

Plaintiffs herein incorporate by reference, as part of this complaint, each and every ground asserted in the attached claim for refund, and make the same a part of this complaint, as if repeated in full herein.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$1,459.33 together with interest thereon at the rate of 6% per annum from the date of the overpayment herein made which occurred on July 13, 1949, together with their costs and disbursements herein to be taxed.

EGGERMAN, ROSLING,
WILLIAMS,
/s/ JOSEPH J. LANZA,
Attorneys for Plaintiff.

EXHIBIT A

Form 843

Treasury Department

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collectors Stamp (Date received): Blank.

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps: Henry F. Waechter, Hazel Miller and William G. Waechter, Co-executors of the Estate of May Florence Waechter (deceased).

Business address: 918 Vance Building, Seattle, Washington.

Residence:

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Tacoma, Washington.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from, 19...., to, 19....

3. Character of assessment or tax: Estate tax.

4. Amount of assessment, \$2,641.24; dates of payment \$850.60 on 3/29/48; \$1,790.62 on 7/13/49.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$1,459.33.

7. Amount to be abated (not applicable to income, gift, or estate taxes) \$

8. The time within which this claim may be legally filed expires, under section 910 of Internal Revenue Code on July 13, 1952.

The deponent verily believes that this claim should be allowed for the following reasons: This claim is based on the overpayment of so much of the estate tax paid as is attributable to the inclusion in decedent's gross estate of one-half of the cash surrender value (\$10,642.38) of insurance policies in the name of the surviving spouse as assured.

(See attached sheets for statement of reason for allowance of Claim.)

/s/ HENRY F. WAECHTER,

HAZEL WAECHTER MILLER
(Dumett),

WILLIAM G. WAECHTER,

Co-executors of the Estate of May Florence
Waechter, Deceased.

Subscribed and sworn to before me this 23 day
of August, 1949.

JOSEPH J. LANZA,
Notary Public.

The insurance policies involved herein were all carried upon the life of Henry Waechter, the surviving spouse, and are identified as follows:

United States of America

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waechter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00
Total Cash Surrender Value.....					\$21,284.75

Said policies were taken out during the married life of the insured and decedent, and all premiums thereon were paid entirely from community funds down to the date of Mrs. Waechter's death, and on that date, the policies were in full force and effect.

None of the policies have been surrendered, and none of the beneficiaries of decedent's estate have received any payments on account of the cash surrender value thereof at the date of decedent's death.

Petitioners content that as the insurance taken out by the surviving spouse was not on the life of the decedent wife, and that as none of the amounts here involved have been received by the executors or any heir or beneficiary of the decedent, no part of the cash surrender value thereof is includable as part of the gross estate of decedent for federal estate tax purposes.

The policies here involved were all payable upon the death of the insured husband, and nothing whatsoever became payable on the death of the wife beneficiary. So far as the cash surrender value thereof is concerned, it is merely a potential asset, and does not become an actual asset until the money is reduced to possession by surrender and cancellation of the policy. Even though such a potential asset may be considered "property" it is not that type of "property" in which any interest therein can be said to pass upon the death of the wife. Whatever may be realized by anyone on the cash surrender value is acquired solely by virtue of the contract between the insurer and the insured, and not by virtue of the death of the decedent wife.

Congress manifested its intent not to consider such interest taxable by specifically providing for the taxation of insurance on decedent's life. (Sec. 811 (g) (I.R.C.) It did not provide that the cash surrender value of a policy on the life of a living person should be subject to an estate tax. If Congress had desired to impose a tax upon such value, as part of the estate of a deceased beneficiary, it would have been easy to express that intent in the statute which it enacted.

On similar facts, the Supreme Court of the State of Washington has ruled that no part of the cash surrender value of insurance policies on the life of the surviving spouse, are taxable for inheritance tax purposes, since such property does not pass by will or by statutes of inheritance, nor constitutes

“insurance payable upon the death of any person.”
In re Martha Knight’s Estate, 131 Wash. Dec. page
758 (decided November 8, 1948).

While the federal estate tax is neither a property nor an inheritance tax, but is an excise tax, nevertheless, the tax is imposed only upon the “transfer” of property or interest therein at the death of the owner, and with respect to insurance, only upon the proceeds payable upon the death of the insured.

Since therefore, no part of the cash surrender value of such policies was “transferred” by the death of the wife beneficiary, it should not have been included as part of her gross estate and taxable to the extent of one-half of the value thereof. By including such an interest, the total tax assessed amounted to \$2,530.66, to which there was added and collected \$110.58 on account of interest, making a total of \$2,641.24 which was paid by the executors herein. By excluding one-half of the cash surrender value amounting to \$10,642.38, the correct tax should have been \$1,160.57 plus interest of \$21.34, making a total of \$1,181.91. The difference between the total amount paid and the correct amount is \$1,459.33, for which this claim is made.

The estate tax return was filed herein by the Executors on March 19, 1948, and said Executors are still acting as such in this estate.

[Endorsed]: Filed April 6, 1950.

[Title of District Court and Cause.]

ANSWER

The defendant, United States of America, by J. Charles Dennis, United States Attorney, for an answer to the plaintiff's complaint herein admits, denies and alleges as follows:

I.

The allegations in paragraph numbered I are admitted.

II.

The allegations in paragraph numbered II are admitted, except that it is denied that the taxes were erroneously or illegally assessed or collected.

III.

The allegations in paragraph numbered III are admitted.

IV.

The allegations in paragraph numbered IV are admitted.

V.

The allegations in paragraph numbered V are admitted, except that it is alleged that the estate tax return was filed on March 22, 1948, instead of on March 19, 1948, as alleged herein.

VI.

The defendant has no knowledge or information sufficient to form a belief to the truth of the averments in paragraph numbered VI.

sioner of Internal Revenue and collected as an estate tax by the Collector of Internal Revenue at Tacoma, Washington; that the amount of claim involved herein does not exceed \$10,000.00; and this Court has jurisdiction of the subject matter of this action under Judicial Code Section 24, as Amended, and U.S.C.A. Title 28, Secs. 1340 and 1346.

III.

The death of May Florence Waechter occurred on February 20, 1947, while she was a resident of Seattle, King County, Washington.

IV.

Plaintiffs were appointed co-executors of the Will and Estate of said May Florence Waechter by order entered on the 4th day of April, 1947, by the Superior Court of the State of Washington in and for King County; and at all times since have continued to be and act as the fully authorized executors of the said Will and Estate.

V.

On March 22, 1948, plaintiffs, acting as such executors, filed with the Collector of Internal Revenue, at Tacoma, Washington, the estate tax return on behalf of said estate of May Florence Waechter, deceased. That there was included in said return as part of the gross estate of decedent one-half the cash surrender value of the following insurance policies which were all carried upon the life of Henry Waechter, the surviving spouse, and are identified as follows:

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waech- ter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00
Total Cash Surrender Value.....					\$21,284.75

VI.

That the said policies were taken out during the married life of the insured and the decedent; the premiums on the policies were paid from community funds down to the date of May F. Waechter's death, and on that date the policies were in full force and effect and had not been surrendered or any payments received on account of the cash surrender value thereof.

VII.

That in the estate tax return referred to in paragraph V, above, said executors reported a gross estate of \$77,480.25 and a tax liability of \$850.62, which amount accompanied the return. In the assets listed in that return under Schedule F was included, as stated in paragraph V, the cash surrender value of the insurance policies reported as

\$10,642.38. Upon the audit of such return, the investigating officer recommended assessment of a deficiency in the amount of \$1,680.04 due to certain additions to income and disallowance of deductions, neither of which is at issue in the present action. That said deficiency was assessed in June, 1949, and was paid by the estate with interest in the amount of \$110.58 on July 6, 1949.

VIII.

That on August 24, 1949, plaintiffs, as such executors, filed timely refund claim in the amount of \$1,459.33 based upon the alleged overpayment of the estate tax in that amount due to inclusion in decedent's gross estate of one-half of the surrender value of the insurance policies heretofore referred to above.

IX.

That six months since the filing of said claim having expired and the Commissioner of Internal Revenue having neither allowed nor disallowed the said claim, this action was timely instituted.

It is further stipulated and agreed that this case involves the following questions:

Whether one-half the cash surrender value of life insurance policies on the life of decedent's husband was properly included in decedent's gross estate for Federal estate tax purposes.

Statutes Involved

Internal Revenue Code—Section 811(e)(2), added by section 402(b) (2) of the Revenue Act of

1942, as applicable to estates of decedents dying after October 21, 1942, and on or before December 31, 1947, (Regulations 105, sec. 81.23), provides as follows:

Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States——

* * *

(e) Joint and Community Interests.——

* * *

(2) Community interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Remington Revised Statutes of Washington

Sec. 1342. Descent of community property.

Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. * * *

Sec. 6892. Community property defined—Husband's control of personalty.

Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

Plaintiffs' Contentions

Plaintiffs contend that as the insurance taken out by the surviving spouse was not on the life of the decedent wife, and that as none of the amounts here involved have been received by the executors or

any heir or beneficiary of the decedent, no part of the cash surrender value thereof is includable as part of the gross estate of decedent for federal estate tax purposes.

Congress manifested its intent not to consider such interest taxable by specifically providing for the taxation of insurance on decedent's life. Sec. 811(g) (I.R.C.) It did not provide that the cash surrender value of a policy on the life of a living person should be subject to an estate tax. If Congress had desired to impose a tax upon such value, as part of the estate of a deceased beneficiary, it would have been easy to express that intent in the statute which it enacted.

On similar facts, the Supreme Court of the State of Washington has ruled that no part of the cash surrender value of insurance policies on the life of the surviving spouse, are taxable for inheritance tax purposes, since such property does not pass by will or by statutes of inheritance, nor constitutes "insurance payable upon the death of any person." *In re Martha Knight's Estate*, 31 Wn.(2d) p.

While the federal estate tax is neither a property nor an inheritance tax, but is an excise tax, nevertheless, the tax is imposed only on the "transfer" of property or interest therein at the time of the death of the owner, and with respect to insurance, only upon the proceeds payable upon the death of the insured.

Defendant's Contentions

The defendant contends that the plaintiffs, in their Federal estate tax return as filed, properly included in the gross estate of the decedent one-half the cash surrender value of the certain life insurance policies on the life of the decedent because:

1. Under the laws of the State of Washington and the decisions of its Supreme Court, the cash surrender value of such life insurance policies is community property where the premiums have been paid from community funds, and inclusion of one-half the cash surrender value thereof is required under Sec. 811 of the Internal Revenue Code, *supra*.

It is further stipulated and agreed that the right of either party is reserved to introduce additional evidence, not inconsistent with the facts herein stipulated.

/s/ JOSEPH J. LANZA,
EGGERMAN, ROSLING &
WILLIAMS,
Attorneys for Plaintiffs.

/s/ J. CHARLES DENNIS,
/s/ THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed March 9, 1951.

[Title of District Court and Cause.]

MEMORANDUM DECISION

Appearances:

For Plaintiffs:

EGGERMAN, ROSLING & WILLIAMS,
RALPH J. LANZA,
Seattle, Washington.

For Defendant:

J. CHARLES DENNIS,
United States Attorney.
THOMAS R. WINTER,
Assistant U. S. Attorney,
Seattle, Washington.

Yankwich, District Judge:—

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the plaintiff as prayed for in the Complaint, the exact amount to be computed by the parties.

Judgment and Findings to be prepared by counsel for the Plaintiff, unless counsel should agree that the stipulated statement of facts take the place of Findings, in which event only Conclusions of Law and Judgment need be filed under Local Rule 26.

Comment

At the time of her death, May F. Waechter was the beneficiary of three insurance policies taken out by her surviving husband, Wm. G. Waechter, during her lifetime. Briefly described, they were as follows:

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waech- ter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor.....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of insured....	\$ 3,620.00

Up to the time of her death, the premiums for the policies were paid out of the community funds of herself and her husband. Her executors, on March 22, 1948, filed an estate tax return which included as a part of the gross estate the total cash surrender value of the policies, amounting to \$21,284.75. The Collector assessed a deficiency on one-half of the cash surrender value of the policies in the amount of \$1459.33, which was paid. Timely claim for refund having been refused, this action was instituted.

The problem before the Court is whether the tax was due. It is the Government's contention that the community interest in the insurance policy was liable for the tax under Section 811(e)(2) of the Internal Revenue Code (26 U.S.C.A., Sec. 811(e)(2)).

We cannot agree.

Estate taxes are imposed because a transfer of

an estate occurs upon a person's death. Knowlton v. Moore, 1900, 178 U. S. 41, 56, 59; Heiner v. Donnan, 1932, 285 U. S. 312; Helvering v. St. Louis Trust Co., 1935, 296 U. S. 39, 41.

Under the law of the State of Washington, the wife has an interest in everything acquired by the husband with community funds. (Remington, Revised Statutes of Washington, Sec. 1342.) The husband has control of the personalty. (Remington, Revised Statutes of Washington, Sec. 6892.) Under the terms of the policies of insurance, the husband has the right to change the beneficiary. And, while in making such change, he cannot give away the proceeds to strangers, (Occidental Life Ins. Co. v. Powers, 1937, 192 Wn. 475, 74 P(2) 27; King v. Prudential Ins. Co., 1942, 13 Wn.(2) 414, 125 P(2) 282) he may, without the consent of his wife, change the beneficiary from his wife to his estate. (In re Towey's Estate, 1945, 22 Wn(2) 212, 155 P(2) 273.) However, the protection which is thus extended against an unauthorized disposition of the wife's interest in an insurance policy does not make the interest of the wife in a policy in which she is the beneficiary "property which passes by will or by a statute of inheritance." (In re Knight's Estate, 1949, 31 Wn(2) 813, 199 P(2) 89, 94.) In the case of policies payable on the death of an insured, who is the surviving spouse, "nothing whatever became payable on the death of the beneficiary, the deceased wife." (In re Knight's Estate, *supra*, p. 941.)

The language just quoted was used in a case

arising under the inheritance tax statute of the State of Washington. But the logic of the reasoning applies with equal force to the estate tax. To be taxable, a transfer of an estate must occur. And if, as it appears, the wife had no power to transfer one-half of her surrender value in the policy, and upon her death, nothing became due to her heirs, there is no interest to which the estate tax would attach. The same result is reached if we approach the problem from another angle. The duty to pay the estate tax devolves upon the executor (26 U.S.C.A., Secs. 822, 825. Severe penalties are imposed for failure to perform this duty. (26 U.S.C.A., Sec. 145), in addition to distraints against the estate. (26 U.S.C.A., Secs. 826-827.)

Recently in my home District, executors were actually prosecuted for attempt to evade the estate tax by failing to make a proper return. (*United States v. Cole*, 1950, D.C. Cal., 90 F. Supp. 1471.)

Under Washington law, the executor is given the right to the possession or management of all the real and personal property of the deceased, and to receive the rents and profits of the real estate until the estate is settled. (Remington, Revised Statutes, Sec. 1464.) It is made his duty, within one month after his appointment, to return a true inventory of "all the property of the estate which shall have come into his hands," and to apply to the Court for the appointment of appraisers to appraise the property so inventoried. (Remington, Revised Statutes, Sec. 1465.)

In the case of a life insurance policy upon the life of the husband, there is no provision in the law of the State of Washington for liquidating any interest which the wife may have had in the property. Granted that the policy has a possible cash surrender value, there is no provision in law for reducing it to the possession or control of the wife's executor. He cannot compel the husband to cancel the policy, in order that its surrender value might be equally divided between the estate and the husband. And the surrender value remains in the realm of possibility, unless there be power to compel surrender. So that, if the contention of the Government be correct, we would have the anomaly to which I referred at the trial, that of requiring the executor to pay a tax on property which has not come into, and which he cannot reduce, to his possession, under penalty of subjecting the estate to heavy civil penalties, and himself to criminal prosecution, if he willfully avoids doing so.

Granted that the Congress has power to exact taxes in cases where no transfer occurs in contemplation of state law, the fact remains that the only basis for any claim by the Government in this case is the community property law of the State of Washington. (See, *DeLappe v. Commissioner*, 1940, 5 Cir., 113 F(2) 48.) As already appears, that law provides no method for separating from the value of the policy the portion belonging to the wife so as to incorporate it into her estate and subject it to estate tax upon her death. The case of *Carroll*,

1933, 29 B.T.A. 11, is not convincing. It is based on Louisiana law. The policy was payable to the husband's estate. The Board took the view that, under Louisiana law, one-half of the surrender value of the policy automatically became a part of the wife's estate upon her death. But the Knight case, decided under Washington law, distinctly holds that in Washington, upon the death of the wife, no estate passes to her heirs. And, as we are interpreting Washington law, this decision is binding on us. (See, *DeLappe v. Commissioner*, supra.)

In what precedes, we have already indicated other reasons why, under this law, a different conclusion is commanded. It should be added that the view here reached finds support in the cases holding that a decedent's gross estate does not include "property subject to an unexercised general power." (See, *Helvering v. Safe Deposit Co.*, 1942, 316 U. S. 56, 62; *Porter v. Commissioner*, 1933, 288 U. S. 436; *Lehman v. Commissioner*, 1940, 2 Cir., 109 F(2) 99; *Estate of Royce*, 1942, 46 B.T.A. 1090.) And, at best, the wife possessed only the power, in her lifetime, to prevent an unauthorized change of beneficiary. (*California-Western States Life Ins. Co. v. Jarman*, 1947, 29 Wn(2) 98, 185 P(2) 494.)

Hence the ruling above made.

Dated this 9th day of July, 1951.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

STIPULATION THAT STIPULATED STATE-
MENT OF FACTS SHALL TAKE THE
PLACE OF FINDINGS

It Is Hereby Stipulated by and between plain-
tiffs and defendant, through their undersigned at-
torneys of record that the stipulated statement of
facts on file herein shall take the place of findings
of fact, and that the court may enter only conclu-
sions of law and judgment herein.

EGGERMAN, ROSLING &
WILLIAMS,

/s/ JOSEPH J. LANZA,
Attorneys for Plaintiffs.

/s J. CHARLES DENNIS,
/s/ THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed August 8, 1951.

[Title of District Court and Cause.]

CONCLUSIONS OF LAW

This matter having come on regularly for trial
before the undersigned judge of the above-entitled
court on March 13, 1951, upon a stipulated state-
ment of facts on file herein, and the respective
parties having stipulated that the said stipulated
statement of facts shall take the place of findings
of fact, and the court having considered the argu-

ment of counsel and the written briefs submitted by the respective parties herein, and the court having filed its memorandum decision, now, therefore, from said stipulated statement of facts, the court draws the following:

Conclusions of Law

1. That one-half the cash surrender value of the life insurance policies on the life of decedent's husband, was not properly included in decedent's gross estate for federal estate tax purposes.

2. That plaintiffs are entitled to judgment against defendant in the sum of \$1,459.33, with interest thereon at the rate of six per cent per annum from July 13, 1949, to the date of the entry of judgment herein and for plaintiffs' costs herein to be taxed.

Dated this 6th day of August, 1951.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

/s/ JOSEPH J. LANZA,
Of Attorneys for Plaintiffs.

Approved as to Form for Entry:

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

[Endorsed]: Filed August 8, 1951.

In the United States District Court, Western
District of Washington, Northern Division

No. 2513

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of MAY FLORENCE WAECH-
TER, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly before the undersigned judge of the above-entitled court on the day of July, 1951, for the entry of judgment pursuant to the conclusions of law entered this date, now, therefore, pursuant to said conclusions, it is hereby

Ordered, Adjudged and Decreed that plaintiffs, Henry S. Waechter, Hazel Miller and William T. Waechter, co-executors of the Estate of May Florence Waechter, deceased, be and they are hereby granted judgment against defendant, United States of America in the sum of \$1,459.33, with interest thereon at the rate of six per cent per annum from July 13, 1949, to the date of this judgment and for plaintiffs' costs herein to be taxed.

Dated this 6th day of August, 1951.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

/s/ JOSEPH J. LANZA,
Of Attorneys for Plaintiffs.

Approved as to Form for Entry:

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

[Endorsed]: Filed and entered August 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Henry S. Waechter, Hazel Miller and William T. Waechter, Co-Executors of the Estate of May Florence Waechter, Deceased, Plaintiffs Named Above, and Eggerman, Rosling & Williams, Attorneys for Plaintiffs:

You, and Each of You, will please take notice that the defendant, United States of America, appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on August 8, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed October 3, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said Cause. The papers herewith transmitted constitute the record on appeal from the final judgment filed in said cause on August 8, 1951, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed Apr. 6, 1950.
2. Praecipe for Issuance of Summons, filed Apr. 6, 1950.
3. Summons, filed Apr. 7, 1950.
4. Stipulation extending time to Aug. 4, 1950, to answer, filed June 9, 1950.
5. Stipulation extending time to Sept. 5, 1950, to answer, filed Aug. 3, 1950. (Additional Time.)
6. Answer, filed Sept. 7, 1950.

7. Trial Brief for the United States, filed Mar. 9, 1951.
8. Stipulation that facts are admitted, filed Mar. 9, 1951.
9. Plaintiff's Brief, filed Mar. 26, 1951.
10. Stipulation extending time to May 1, 1951, in which to file reply brief, filed Apr. 11, 1951.
11. Order granting extension of time, filed Apr. 19, 1951.
12. Supplemental Brief for the United States, filed May 1, 1951.
13. Memorandum Decision, filed July 9, 1951.
14. Stipulation that Stipulated Statement of Facts Shall Take the Place of Findings, filed Aug. 8, 1951.
15. Conclusions of Law, filed Aug. 8, 1951.
16. Judgment, filed Aug. 8, 1951.
17. Notice of Appeal, filed Oct. 3, 1951.

I certify that the following is a true and correct statement of all expenses, costs, fees, and charges incurred in my office for preparation of the record on appeal herein on behalf of defendant, to wit:

Notice of Appeal.....\$5.00,

and that this amount has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand

and affixed the official seal of said District Court of Seattle, this 6th day of November, 1951.

[Seal] MILLARD P. THOMAS,
 Clerk,
By /s/ TRUMAN EGGER,
 Chief Deputy.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the United States by and through its attorney, J. Charles Dennis, United States Attorney, and designates the following to be included in the record on appeal in the above-entitled action:

1. Complaint.
2. Answer.
3. Stipulated Statement of Facts.
4. Stipulation that Stipulated Statement of Facts shall take the place of Findings.
5. Conclusions of Law.
6. Judgment.
7. Notice of Appeal.
8. This Designation of Record.

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed November 21, 1951, U.S.D.C.

[Endorsed]: Filed November 26, 1951, U.S.C.A.

[Endorsed]: No. 13153. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Henry S. Waechter, Hazel Miller and William T. Waechter, Co-Executors of the Estate of May Florence Waechter, deceased, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 8, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13153

UNITED STATES OF AMERICA,
Appellant,

vs.

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors of
the Estate of MAY FLORENCE WAECH-
TER, Deceased,

Appellee.

STATEMENT OF POINTS

Comes now the United States by and through its
attorney, J. Charles Dennis, United States Attor-

ney, and represents to this Court that the following are the points to be relied upon by the appellant in its appeal:

That the lower court committed reversible error when it held "That one-half the cash surrender value of the life insurance policies on the life of decedent's husband was not properly included in the decedent's gross estate for federal estate tax purposes.

/s/ J. CHARLES DENNIS,
United States Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 23, 1951.

No. 13153

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

HENRY S. WAECHTER, HAZEL MILLER
and WILLIAM T. WAECHTER,
Co-Executors of the Estate of
May Florence Waechter, Deceased,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE LEON R. YANKWICH, *Judge*

BRIEF FOR THE UNITED STATES

ELLIS N. SLACK,
Acting Assistant Attorney General

MELVA M. GRANNEY,
Special Assistant to the
Attorney General.

J. CHARLES DENNIS,
United States Attorney.

JAN 14 1952

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

PAUL P. O'BRIEN
CLERK

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The District Court erred in holding that Section 811 (e) (2) of the Internal Revenue Code does not require the inclusion in the decedent's gross estate of any part of the cash surrender value of the insurance policies on the life of the decedent's husband on which the premiums had been paid with community funds 10

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HONORABLE LEON R. YANKWICH, *Judge*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 23-28)
is reported at 98 F. Supp. 960.

JURISDICTION

The plaintiff-appellees, who are the duly appointed, acting and qualified executors of the estate

of May Florence Waechter (R. 15), deceased, filed an estate tax return on behalf of the estate on March 22, 1948 (R. 15, 16). In the return they reported a gross estate of \$77,480.25, which included one-half of the cash surrender value of certain insurance policies upon the life of the decedent's surviving spouse, Henry Waechter (R. 16, 17-18), and an estate tax liability of \$850.62, which they paid (R. 17). Subsequently the executors paid a deficiency of \$1,680.04 which was assessed by reason of matters not in issue here (R. 18). On August 24, 1949, they filed a timely claim for refund of \$1,459.33 based upon the alleged overpayment of estate tax in the amount due to inclusion in the decedent's gross estate of one-half of the cash surrender value of the insurance policies above-mentioned. (R. 18). Six months elapsed during which the Commissioner neither allowed nor disallowed the claim (R. 14) and this suit was instituted on April 6, 1950 (R. 12), which was within the time provided by Section 3772 (a) (2) of the Internal Revenue Code. The District Court had jurisdiction of the case under 28 U.S.C. Sections 1340 and 1346. Judgment for plaintiff-appellee was entered on August 8, 1951. (R. 31-32.) Notice of appeal by the United States was filed on October 3, 1951 (R. 32), and properly invoked the jurisdiction of this Court under 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in holding that Section 811 (e)(2) of the Internal Revenue Code does not require the inclusion in the decedent's gross estate of any part of the cash surrender value of the insurance policies on the life of the decedent's husband on which the premiums had been paid with community funds.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States —

* * *

(e) [as amended by Sec. 402 (b)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Joint and Community Interests.* —

* * *

(2) [as added by Sec. 402 (b)(2) of the Revenue Act of 1942, supra] *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services

actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * *

(26 U.S.C. 1946 ed., Sec. 811.)

3 *Remington's Revised Statutes of Washington Annotated:*

Sec. 1342. *Descent of community property.* Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

8 *Remington's Revised Statutes of Washington Annotated:*

Sec. 6892. *Community property defined — Husband's control of personalty.* Property, not

acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

STATEMENT

The parties stipulated in the District Court that the stipulated facts shall take the place of findings of fact. (R. 29.) The stipulated facts (R. 15-18) may be stated as follows:

The decedent, May Florence Waechter, died on February 20, 1947. (R. 16.)

During the married life of the decedent and her husband, Henry Waechter, the following insurance policies were carried upon the life of Henry Waechter (R. 17):

Amount of Policy	Name of Company	No. of Policy	Date of Policy	Beneficiary	Cash Value as of 2/20/47
\$ 3,000.00	Equitable Life Co.	1196536	1/14/03	May F. Waechter if living, but if not, to William G. Waech- ter and Hazel B. Miller equally, or survivor, and should neither survive, to assured's estate.....	\$ 2,420.00
\$25,000.00	New York Life Co.	6320634	8/ 6/18	May F. Waechter and after death to Hazel B. Miller and Gerry Waechter, share and share alike, or survivor....	\$15,244.75
\$ 4,000.00	Equitable Life Co.	1337670	5/11/04	May F. Waechter or estate of in- sured	\$ 3,620.00
Total Cash Surrender Value.....					\$21,284.75

The premiums on these policies had been paid with community funds down to the date of the decedent's death and on that date the policies were in

full force and effect and had not been surrendered, nor had any payments been received on account of the cash surrender value of the policies. (R. 17.)

In the estate tax return they filed on behalf of the estate of the decedent, the executors of the estate included one-half of the cash surrender value of the policies in the decedent's gross estate (R. 17-18) but subsequently they filed claim for refund and instituted this suit for refund of the tax paid on the one-half of the cash surrender value of the policies (R. 18, 20-21). The United States defended the suit for refund on the ground that one-half of the cash surrender value of the policies is includible in the decedent's gross estate under Section 811 (e)(2) of the Internal Revenue Code. (R. 22.) The District Court held to the contrary (R. 23-28) and entered judgment for the plaintiff-appellees (R. 31-32).

STATEMENT OF POINTS TO BE URGED

The appellant's statement of points is contained in the record at pages 36-37. It is the Commissioner's position that the District Court erred in holding that one-half the cash surrender value of the life insurance policies on the life of the decedent's husband, on which the premiums had been paid with community funds, is not includible in the decedent's gross estate for federal estate tax purposes.

SUMMARY OF ARGUMENT

Community funds were used to pay the premiums on the insurance policies on the life of the decedent's husband. The policies were accordingly community property under the law of the State of Washington. Section 811 (e)(2) of the Internal Revenue Code, applicable to the estate of the instant decedent, requires the inclusion in a decedent's gross estate of the value of property held as community property by the decedent and surviving spouse, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. The stipulated facts contain no statement to afford a basis for such an exclusion, but the executors of the decedent's estate included only one-half of the value of the policies (one-half of their cash surrender value) in the decedent's gross estate and are here seeking to recover only the tax paid by reason of such inclusion. Since the policies were held by the decedent and her surviving husband as community property, one-half of the cash surrender value of the policies was properly included in the decedent's gross estate under Section 811 (e)(2).

The District Court's decision to the contrary was

based upon the erroneous assumption that estate tax liability does not attach unless an estate passed by will or inheritance upon the decedent's death. Concededly, one-half of the cash surrender value of the policies was not property which passed by will or inheritance upon the decedent's death. However, that is immaterial for federal estate tax purposes in general and under Section 811 (e)(2) in particular. Upon the decedent's death someone, presumably her husband, received the decedent's interest in the policies, that is, the right, upon surrender of the policies, to receive the one-half of the cash surrender value which would have belonged to the decedent but for her death. The decedent's death effected a termination of her interest in the policies and a change in legal and economic relationships with respect to the policies. That is sufficient to support taxability under *Fernandez v. Wiener*, 326 U.S. 340, rehearing denied, 327 U.S. 814, which sustained the constitutionality of Section 811 (e)(2).

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT SECTION 811 (e)(2) OF THE INTERNAL REVENUE CODE DOES NOT REQUIRE THE INCLUSION IN THE DECEDENT'S GROSS ESTATE OF ANY PART OF THE CASH SURRENDER VALUE OF THE INSURANCE POLICIES ON THE LIFE OF THE DECEDENT'S HUSBAND ON WHICH THE PREMIUMS HAD BEEN PAID WITH COMMUNITY FUNDS.

Section 811 (e) (2) of the Internal Revenue Code, *supra*, which is applicable to the estate of the decedent, May Florence Waechter,¹ requires the inclusion in the decedent's gross estate of all property —

to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, * * * except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or

¹ Section 811 (e) (2), together, with other estate tax provisions relating to community property, was repealed by Section 351 (a) of the Revenue Act of 1948, c. 168, 62 Stat. 110, effective with respect to estates of decedents dying after December 31, 1947, but the instant decedent died on February 20, 1947. Since the repeal of Section 811 (e) (2), community property has been includible in a decedent's gross estate only to the extent it is includible therein under Section 811 (a) which relates to the decedent's interest in property.

from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

The District Court held that this section does not require the inclusion in the decedent's gross estate of any part of the cash surrender value of the insurance policies on the life of the decedent's husband on which the premiums had been paid with community funds. In so holding the District Court clearly erred, as will be seen.

The District Court did not deny and there can be no doubt that, since the premiums on the insurance policies were paid with community funds, the policies were held as community property by the decedent and her surviving spouse. See Section 6892 of 8 Remington's Revised Statutes of Washington Annotated, *supra*; *Lang v. Commissioner*, 304 U.S. 264; *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475; *King v. Prudential Insurance Co.*, 13 Wash. (2d) 414; *In re Towey's Estate*, 22 Wash. (2d) 212; *Small v. Bartyzel*, 27 Wash. 176; *Wilson v. Wilson*, 212 P. (2d) 1022 (Wash.); cf. *Poe v. Seaborn*, 282 U.S. 101; *De Lappe v. Commissioner*, 113 F. (2d) 48 (C.A. 5th); *Graham v. Commissioner*, 95 F. (2d) 174 (C.A. 9th); *Womack v. Womack*, 141 Tex. 299. In

the State of Washington, when community funds are used to pay the premiums on an insurance policy on the husband's life, the husband can give away only one-half of the proceeds of the policy. *Wilson v. Wilson, supra.* The proceeds of the policy are community property, even when payable to the husband's estate, unless the husband has obtained the wife's consent to the designation or change of beneficiary to someone other than his estate or unless the wife is designated as the sole beneficiary. *Occidental Life Ins. Co. v. Powers, supra; King v. Prudential Insurance Co., supra; In re Towey's Estate, supra.* During the life of the insured, insurance forms a reserve to be drawn upon in times of stress (*Massachusetts Mutual Life Ins. Co. v. Bank of California*, 187 Wash. 565) and, as the Supreme Court of Washington stated in *Occidental Life Ins. Co. v. Powers, supra*, p. 484—

In this state, insurance or the proceeds of insurance are not mere expectancies or choses in action, but are property; and if the premiums are paid by the assets of the community, they constitute community property.

If policies on which the premiums have been paid with community funds are cash surrendered, the cash surrender value is community property, just as it was held in *Jones v. Davis*, 15 Wash. (2d) 567, that

any proceeds obtained as a loan on such a policy are community property.

The fact that the instant insurance policies constituted property “held as community property by the decedent and surviving spouse” *per se* precludes recovery by the decedent’s estate of the tax paid on one-half the value of the policies, that is, on one-half of the cash surrender value. Actually, Section 811 (e) (2) requires the inclusion in the decedent’s gross estate of the entire value of property held as community property by the decedent and her surviving spouse, except such part of the value—

as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. * * *

The stipulated facts contain no statements to furnish a basis for an exclusion on either of those grounds and, accordingly, on the basis of the stipulated facts the entire cash surrender value of the policies would be includible in the decedent’s gross estate under Section 811 (e) (2). However, the executors of the estate included only one-half of the cash surrender value of the policies in the decedent’s gross estate and it is only the tax paid on that one-half

which the estate is seeking to recover in this proceeding.

The District Court's decision, holding that the estate is entitled to recover, is based upon the erroneous assumption that federal estate tax liability does not attach unless an "estate" passes *by will or inheritance* upon the decedent's death. Concededly, in *In re Knight's Estate*, 31 Wash. (2d) 813, where community funds had been used to pay the premiums on insurance policies on the life of the husband, it was held that the cash surrender value of the policies was not property which was includible in the decedent-wife's estate for state inheritance tax purposes as being property which passed by will or inheritance. But that fact is of no importance for federal estate tax purposes under Section 811 (e) (2).

Section 811 (e) (2) does not by its terms apply only to community property which passes upon the decedent's death by will or inheritance, nor can it properly be so interpreted. The statute unqualifiedly requires the inclusion in a decedent's gross estate of the value of property "held as community property by the decedent and surviving spouse", except such part thereof as may be shown to have been received as compensation for personal services actually performed by the surviving spouse or derived originally

from such compensation or from separate property of the surviving spouse. The statute further provides that in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition, but this merely qualifies the previously stated exclusion of such part of the value shown to be attributable to the separate property of the surviving spouse or to compensation for services actually performed by the surviving spouse. In the absence of a showing that some part of the property was attributable to the separate property of the surviving spouse or to compensation for services actually performed by the surviving spouse, the entire value of the community property, and thus the value of the share of the surviving spouse, is includible in the decedent's gross estate *despite the fact that the surviving spouse's share does not pass by will or inheritance at the decedent's death or even pass to anyone in any manner at that time. Fernandez v. Wiener*, 326 U.S. 340, rehearing denied, 327 U.S. 814, so applies the statute. The fact that Section 811 (e)(2) is but a part of Section 811 (e), entitled "Joint and Community Interests", also indicates that it was not intended to be limited in its application to community

property which passes by will or inheritance at the decedent's death. The first paragraph of Section 811 (e) (Section 811 (e)(1)) relates to interests held as joint tenants and as tenants by the entirety and requires the inclusion in a decedent's gross estate of property which definitely does not pass by will or inheritance.

The District Court was in error in stating (R. 26) that "To be taxable, a transfer of an estate must occur". That is shown by the fact that Section 811 (e)(2), in taxing one spouse on the value of the other spouse's share of community property, is not based on the transfer of an "estate" or of property but, as so applied, was nevertheless held to be constitutional in *Fernandez v. Wiener, supra*. The decision in that case discusses at great length the scope of the Congressional power to impose an estate tax. Among other things, the Supreme Court there stated (pp. 352, 356-357, 358):

It is true that the estate tax as originally devised and constitutionally supported was a tax upon transfers. * * * But the power of Congress to impose death taxes is not limited to the taxation of transfers at death. It extends to the creation, exercise, acquisition, or relinquishment of any power of legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily

be the subject of the federal tax as the transfer of the property at death. * * *

* * *

* * * It is enough that death brings about changes in the legal and economic relationships to the property taxed, and the earlier certainty that those changes would occur does not impair the legislative power to recognize them, and to levy a tax on the happening of the event which was their generating source.

* * *

We find no basis for the contention that the tax is arbitrary and capricious because it taxes transfers at death and also the shifting at death of particular incidents of property. Congress is free to tax either or both, and here it has taxed both, as it may constitutionally do, in order to accomplish "the purposes and policy of taxation" to protect the revenue and avoid an unequal distribution of the tax burden. * * *

There can, therefore, be no question that Section 811 (e)(2) requires the inclusion in the decedent's gross estate of at least the one-half of the cash surrender value involved here. As we have shown, the policies are held by the decedent and her surviving husband as community property, which is all the statute requires and is sufficient to support taxability. While the decedent's death did not effect a transfer of one-half the cash surrender value of the policies to her heirs or legatees, it did necessarily effect a transfer to someone of her community interest in the policies (the value of which was one-half of their cash

surrender value), although not a transfer of money in the amount of one-half of the cash surrender value. The policies were in full force and effect at the decedent's death and someone, presumably the decedent's husband, received the right, upon surrender of the policies, to receive the one-half of the cash surrender value which would have belonged to the decedent but for her death. Actual transfer of one-half of the cash surrender value was unnecessary to support taxability; under *Fernandez v. Wiener, supra*, it is sufficient that the decedent's death effected a termination of her interest in, and a change in legal and economic relationship with respect to, the policies.²

The District Court was of course in error in giving consideration (R. 26-27) to the fact that the executors of the decedent's estate could not reduce one-half of the cash surrender value of the policies to their possession on behalf of the decedent's estate. Section 811 of the Code contains a number of provisions requiring the inclusion in a decedent's gross estate of the value of property which cannot be reduced to the possession of the executors and it is no barrier to application of any of those statutes, in-

² It is pertinent to note that the decedent was a beneficiary under each of the policies and that her death therefore also effected a change in legal and economic relationships with respect to the future proceeds of the policies.

cluding Section 811 (e)(2), that the executors are nevertheless under a duty to include the value of such property in the decedent's gross estate in filing an estate tax return on behalf of the estate.

Taxpayers may contend that Section 811 (g) of the Code, in providing for the inclusion of certain proceeds of insurance in a decedent's estate, is exclusive with respect to life insurance and that if an insurance policy cannot be included in the gross estate under that section it cannot be included in the gross estate under some other section. The contention is clearly untenable. That is definitely established by the House Ways and Means Committee Report on the Revenue Act of 1942, which amended Section 811 (g). There the Committee stated (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 163 (1942-2 Cum. Bull. 372, 492)):

This section, like the present provisions in Section 811 (g), does not constitute the only section under which life insurance is includible in the gross estate. * * *

For cases where it has been held that life insurance was includible in an estate under sections of the Code other than Section 811 (g), see *Vanderlip v. Commissioner*, 155 F. (2d) 152 (C.A. 2d), certiorari denied, 329 U.S. 728, and *Davidson's Estate v. Commissioner*, 158 F. (2d) 239 (C.A. 10th).

CONCLUSION

The decision of the District Court is incorrect and should be reversed.

Respectfully submitted,

ELLIS N. SLACK,
Acting Assistant Attorney General.

MELVA M. GRANEY,
*Special Assistant to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.
January, 1952.

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BRIEF OF APPELLEES

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FILED

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United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY S. WAECHTER, HAZEL MILLER and
WILLIAM T. WAECHTER, Co-Executors
of the Estate of May Florence Waech-
ter, Deceased,

Appellees.

No. 13153

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE LEON R. YANKWICH, *Judge*

BRIEF OF APPELLEES

JURISDICTION

District Court —

This is a civil action brought by Appellees, who are the duly appointed, acting and qualified Executors of the Estate of May Florence Waechter, Deceased, against the United States of America, Appellant, for the recovery of internal revenue taxes which were allegedly erroneously and illegally assessed and collected as an Estate Tax by the Collector of Internal Revenue at Tacoma, Washington, involving an amount under \$10,000.00 (R. 15, 16). An Estate Tax Return was filed on behalf of the Estate on March 22, 1948 (R. 16). In the Return, the Executors, reported a gross estate of

\$77,480.25, and a tax liability of \$850.62, which amount accompanied the Return (R. 17). In the assets listed in that Return under Schedule F, was included the cash surrender value of certain insurance policies upon the life of decedent's surviving spouse, Henry Waechter (R. 16, 17). Subsequently, the Executors paid a deficiency of \$1,680.04, which was assessed by reason of matters not in issue here (R. 18). On August 24, 1949, the Executors filed a timely claim for refund of \$1,459.33, based upon the alleged overpayment of estate tax in that amount due to inclusion in decedent's gross estate of one-half of the cash surrender value of the insurance policies above mentioned (R. 18). Six months elapsed, during which the Commissioner neither allowed nor disallowed the claim (R. 18). This suit was timely instituted on April 6, 1950 (R. 12, 18), which was within the time provided by Section 3772(a)(2) of the Internal Revenue Code. The District Court had jurisdiction of the case under Judicial Code Section 24, as amended, and U.S.C.A. Title 28, Sections 1340 and 1346.

Court of Appeals—

Final decision and judgment of the District Court for the Western District of Washington, Northern Division, was entered on August 8, 1951 (R. 31, 32). Notice of Appeal by the United States was filed on October 3, 1951 (R. 32), which was within sixty days from the entry of said judgment, as provided in Rule 73(a) of the Rules of Civil Procedure governing the time permitted in any action in which the United States is a party. Jurisdiction of this Court has been properly invoked under U.S.C.A. 28, Section 1291.

STATUTES INVOLVED

(See Appendix)

SUMMARY OF ARGUMENT

1. One-half of the cash surrender value of the policies in question was not subject to "decendent's power of testamentary disposition" and therefore is not includible as part of her gross estate under Section 811(e) (2).

2. Congress expressly covered the taxability of all phases of life insurance by Section 811(g) and if it intended to tax any part of the cash surrender value of such policies upon the death of the non-insured spouse, in a community property estate, it would have logically covered the subject in Section 811(g) rather than leave the matter to speculation and doubt under Section 811(e) (2).

3. No interest was possessed by decedent at the time of her death in and to any part of the cash surrender value of the policies on her husband's life so as to be taxable under Section 811(a).

ARGUMENT**I.**

One-half of the Cash Surrender Value of the Policies in Question Was Not Subject to "Decedent's Power of Testamentary Disposition" and Therefore Is Not Includible as Part of Her Gross Estate Under Section 811 (e) (2).

Prior to enactment, on October 21, 1942, of Code Section 811(e) (2) and other provisions, by the Revenue Act of 1942, the Federal Estate Tax Law did not prescribe the method to be employed in taxing community

property. By virtue of a number of court decisions, however, it became settled that, with certain exceptions, existing only because the particular holding did not conform to certain requirements, community property was includible in the estate of the first spouse to die to the extent of one-half of its value. The one-half was includible under Code Section 811(a) reading "to the extent of the interest therein of the decedent at the time of his death."

This resulted in a considerable advantage to residents of community property states. Lifetime transfers were considered to be half from the husband and half from the wife. Further, because the husband was more likely to die first, and because he was usually responsible for the accumulation of the estate, the taxing of only one-half the community upon the death of the first to die almost invariably resulted in a tax saving. Even where the spouse who contributed least died first, there was an advantage if the surviving spouse died within five years thereafter, or if the first spouse left his or her half to others than the survivor.

Code Section 811(e) (2) enacted by the 1942 Act, and effective as to estates of decedents dying after October 21, 1942, and prior to January 1, 1948, changed all this. That section required that there be included in the estate of a deceased joint holder of property in community the entire value of the community property except to the extent that such property could be shown to have stemmed from compensation received by such decedent's surviving spouse for personal services actually rendered or from the separate property of such surviving spouse. The section further required that there be

included at least so much of the community property passing at the decedent's death as was *subject to the decedent's power of testamentary disposition*. Thus, in a community property estate, where each spouse may by will dispose of one-half the value of the property held in community, at least one-half of the value of such property would be included in the estate of the first to die, even though that spouse may have contributed nothing to the community.

It will be seen from the foregoing summary that the primary concern of Congress in enacting Section 811 (e)(2) was to remove the tax advantages enjoyed by residents in community property states over those residing in the non-community property states, thereby equalizing the tax burden of all of its citizens, and thereby increasing its tax revenue. *Fernandez v. Wiener*, 326 U.S. 340, 90 L.ed. 116.

It will be noted, however, that the law of the state is recognized in determining the *minimum* taxable estate under this section by the provision requiring inclusion of "such part of the community property as was subject to the decedent's power of testamentary disposition." By this statute, Congress therefore clearly intended to include at least that portion of the community property which was subject to testamentary disposition by the decedent, as well as to include the survivor's portion over which the decedent obviously had no such testamentary powers, unless the survivor could show that such portion was received as compensation for personal services actually rendered.

It is apparent that Congress had no intention of

defining in Section 811(e) (2) the type or nature of the property to be taxed, by re-defining the term "interest" as it could have done. On the contrary, its predominant and only purpose was to tax the interest of the surviving spouse in the community property, which previously was held immune from the estate tax, along with the decedent's interest in the community property over which decedent possessed the power of testamentary disposition.

In the court below, appellant made no contention that the entire cash surrender value of the policies should have been included in decedent's gross estate; that is, not only decedent's interest in one-half thereof, but also the interest of the survivor in and to his half, for it was expressly stipulated and agreed that the only question involved was: "Whether one-half of the cash surrender value of life insurance policies on the life of decedent's husband was properly included in decedent's gross estate for Federal Estate Tax purposes (R. 18).

In its Trial Briefs, appellant's primary thesis was that the cash surrender value of the life insurance policies involved in this case was community property and, therefore, subject to decedent's power of testamentary disposition under Rem. Rev. Stat. of Washington Sec. 1342.

This thesis, however, could not be sustained in view of the decision by the Supreme Court of the State of Washington in *In re Knight's Estate*, 31 Wn.(2d) 813, 199 P.(2d) 89. There, the State of Washington attempted to tax under the State Inheritance Laws, one-half of the cash surrender value of a policy of insurance as

part of the estate of the deceased wife, who was the beneficiary named in the policy, exactly as is contended for here by the Government.

The question involved was whether the property sought to be taxed was such as to fall within the definition of the taxing statute which covered all *property* within the jurisdiction of the state, whether tangible or intangible, "which shall pass by will or by statutes of inheritance."

The court held that such an interest was not taxable since the right to surrender a policy and take the cash value thereof stands upon the same legal basis as the right to the proceeds of the policy itself, and like the right to receive the proceeds, arises out of the *contract of insurance*, and does not spring from the death of a testator who is the beneficiary named in the policy.

The court also pointed out that if the legislature had desired to impose an inheritance tax upon the *cash surrender value* of life insurance policies, as part of the estate of a deceased beneficiary, it would have been easy to express that intention in the statute which it enacted, which by its express terms, applied only to "insurance payable upon the death of any person."

The court further pointed out that the policies involved were all payable upon the death of an insured who was the surviving spouse, and nothing whatever became payable on the death of the beneficiary, the deceased wife. On this feature, the court said:

"In other words, even if the cash surrender value of a life insurance policy be considered to be property, still it is not property which passes by will or

by the statute of inheritance. Whatever may be realized by anyone on the cash surrender value of such policies is acquired solely by virtue of the contract between the insurer and the insured.

“In the briefs of counsel, a number of cases are cited wherein this court has gone to some lengths to preserve and protect the wife’s interest in insurance policies upon the life of her husband, where the premiums are paid with community funds. While these cases are generally opposite in considering and determining the effect of community property laws upon such insurance policies, they are of no particular assistance in the solution of the problem presented in this case.

“The cash surrender value of the policies here involved is neither property which passed by will or by the statute of inheritance, under Remington’s Supplement 1945 §11201, nor ‘insurance payable upon the death of any person,’ as provided in Remington’s Revised Statutes (Supplement) §11211 (b). It therefore is not subject to an inheritance tax.”

Since, therefore, the State of Washington has held that the cash surrender value of a life insurance policy is not “property” which passes by will or by statutes of inheritance, it necessarily follows that no part of it can be subject to the decedent’s power of testamentary disposition. And if it is not subject to decedent’s power of testamentary disposition, it cannot possibly become a part of decedent’s gross estate for Federal Tax purposes under Section 811(e)(2), for the Federal Statute is necessarily tied in with the State law when it comes to determining what is property in that state over which the decedent had the power of testamentary disposition.

Thus, Section 811(e)(2) expressly acknowledges this umbilical union with the state law by providing that the *minimum* interest to be included shall be such part of the community property as was subject to decedent's power of testamentary disposition.

The appellant has now "changed its tune." Its opening brief now concedes that "one-half of the cash surrender value of the policies was not property which passed by will or inheritance upon decedent's death" (Br. 9).

Instead, it now argues that Section 811(e)(2) does not by its terms apply only to community property which passes upon decedent's death by will or inheritance, but that the statute unqualifiedly requires the inclusion in a decedent's gross estate of the value of property "held as community property by the decedent and surviving spouse," except such part thereof as may be shown to have been received as compensation for personal services actually performed by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse (Br. 14). The argument is further made that in the absence of a showing that some part of the property was attributable to the separate property of the surviving spouse or to compensation for services actually performed by the surviving spouse, "the entire value of the community property, and thus the value of the share of the *surviving spouse*, is includible in the decedent's gross estate *despite the fact that the surviving spouse's share does not pass by will or inheritance at the decedent's death or even pass to anyone in any manner at that time*" (Br. 15).

In other words, appellant apparently has abandoned its original position that one-half of the cash surrender value was taxable because it belonged to the *decedent* and was subject to her powers of testamentary disposition, and has shifted to the position that the interest of the *surviving spouse* is properly includible in decedent's estate, because there has been no showing in the record that the surviving husband's portion was attributable either to his separate property or to compensation for personal services.

This is a theory not heretofore seriously urged, and if it had been stressed, it would have been very easy for appellees to prove that at least one-half of the premium paid on the policies in question was received as compensation for personal services actually rendered by the surviving spouse. In fact, the government has never required proof of such fact in the past on any estate involving a decedent *wife*, since it was assumed that the husband was the "breadwinner" and that he could always prove that at least one-half of the community property resulted from compensation for personal services rendered by him.

Such a contention coming at this late point should therefore not be considered, and if this court deems such a point vital to a decision herein, appellees respectfully urge that they be allowed to introduce proof of that fact, by remanding the case back to the trial court for that purpose only, so that an express finding can be made thereon.

We do not believe, however, that appellant is serious in that regard, for singularly enough, the collector

accepted appellee's Estate Tax Return without any question whatsoever being raised that only one-half of all the community property was reported by appellees. The only deficiency assessed was due to certain additions to income and disallowance of deductions, neither of which is at issue in the present action (R. 18).

Regardless of this contention, however, if decedent's interest in the policy was not subject to testamentary disposition, and therefore not includible as part of *her* gross estate, how can it logically be argued that the husband's interest therein, which likewise is not subject to a testamentary disposition on his part, should be includible as part of the wife's estate? To so argue, is like saying that zero plus zero equals one.

The true purport of *In re Knight's Estate*, 31 Wn. (2d) 813, 199 P.(2d) 89, is that this intangible interest known as "cash surrender value" is not that type of property which can be taxed upon the death of either spouse, *in the absence of express legislative sanction*, since it is not that type of interest which is subject to the power of testamentary disposition by either spouse.

We submit that the power of testamentary disposition over community property is vital to the operation of Section 811(e)(2), and that Congress was speaking of only that type of property, for otherwise the inclusion of the last sentence of that section would have been meaningless.

The case of *Fernandez v. Wiener*, 326 U.S. 340, 90 L.ed. 116, does not compel a different conclusion, for the problem there was solely one of constitutionality, it being conceded that the Commissioner correctly applied

the statute. No question was presented therein concerning the taxability of "cash surrender value" of a life insurance policy. It was merely concerned with whether Congress had the constitutional power to provide that the portion of the surviving spouse in the community property is to be included in the decedent's gross estate, and we submit that it was concerned only with that type of community property which, in the ordinary sense, is transferable by death. The *Wiener* case, although perhaps persuasive of the proposition that a statute requiring inclusion in the gross estate of a decedent of all community property of the decedent and the surviving spouse, is constitutional, certainly does not justify the conclusion that this statute as written is to be interpreted as the Government contends it should be in the instant case as applied to the cash surrender value of life insurance policies on the life of the surviving spouse. See *Rickenberg v. Commissioner of Internal Revenue*, 177 F. (2d) 114 (C.C.A. 9).

Furthermore, if appellant's contention is correct, why did it stipulate in the court below that only *one-half* of the cash surrender value of the policies was in issue herein, and attempt to convince the trial judge that it was includible in decedent's estate because it was subject to *her* power of testamentary disposition. Certainly, appellant was not referring to the *husband's* interest in making such argument, for obviously she had no power of testamentary disposition over his portion of community property. Besides, to be consistent, appellant should have taken the position in the court below that *all* of the cash surrender value was includ-

ible in her estate, rather than stipulate that only one-half was at issue in the proceeding.

But there is another simple answer to such contention. It will be noticed that 811(g)(4) governing *community property life insurance* specifically provides that the *premiums* paid with community property “shall be considered to have been *paid* by the insured.” Thus there is a statutory presumption that the premiums paid on the policies herein involved were paid by the *insured*, viz., the husband, who is the surviving spouse. This should remove any vestige left of appellant’s argument that since there was no showing made in the court below that some part of the “property” was attributable to the separate property of the surviving spouse or compensation for services actually performed by him, that therefore *his* share of the cash surrender value should be held includible in his *wife’s* estate.

II.

Congress Expressly Covered the Taxability of Life Insurance by Section 811 (g) and If It Intended to Tax Any Part of the Cash Surrender Value of an Insurance Policy Upon the Death of the Non-Insured Spouse, in a Community Property Estate, It Would Have Logically Covered the Subject in That Section Rather Than Leave the Matter to Speculation and Doubt Under Section 811 (e) (2).

It is quite significant to note that Section 402(c) of the Act of 1942 specifically stated:

“For treatment of life insurance acquired with

community property, see amendment to Section 811(g) made by Section 404 of this Act.”

This would seem to clearly indicate that Congress was not attempting to cover the subject of life insurance, or any of its phases, such as cash surrender values, in Section 811(e)(2), but instead referred to another Section, namely 811(g), where the subject was to be covered.

Referring now to Section 811(g), we find Congress legislating only with reference to the *proceeds* of life insurance, whether receivable by the executor or by other beneficiaries. The only reference to community property is found in Subsection (4) reading as follows:

“(4) Community property.

“For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term ‘incidents of ownership’ includes incidents of ownership possessed by the decedent at his death as manager of the community.”

This subsection assumes that the decedent is the insured and clearly contemplates that the death of the insured has occurred as the result of which proceeds of the policy have ripened into payment to stated beneficiaries. It makes no attempt to tax the cash surrender

value of such a policy upon the death of the non-insured spouse in a community property estate. If such an interest was sought to be taxed, we would expect such a provision to appear under this section where it logically would belong, rather than groping in the dark to find it lurking in Section 811(e)(2). It would have been easy for Congress to express that intention under this section which it enacted. By failing to do so, it can only be assumed that Congress did not intend to tax such an interest, for it certainly did not hesitate to be specific concerning the taxation of other interests on which there could be some doubt, such as transfers intended to take effect in possession or enjoyment at or after death, transfers with possession retained, transfers with right to designate who shall possess or enjoy, transfers with power to change the enjoyment, power relinquished in contemplation of death, and powers of appointment, under other portions of Section 811.

Anticipating this argument, appellant states that this contention is "untenable" since the committee reporting on the Revenue Act of 1942 made the statement that Section 811(g) does not constitute the only section under which life insurance is includible in the gross estate (Brief 19).

Appellant cites *Vanderlip v. Commissioner* (C.A. 2d) 155 F.(2d) 152, and *Davidson's Estate v. Commissioner* (C.A. 10) 158 F.(2d) 239, in support of that statement.

Those cases, however, involved transfers by the decedent to trustees prior to death, and such transfers were held to have been made in contemplation of death and

therefore taxable under Section 811(c) after the death of the transferor when the *proceeds* became payable.

The cases cited, and the remarks of the committee quoted in appellant's brief are certainly far removed from the present controversy wherein the insured spouse has not yet died, no transfer of the policies has been made to another, and no proceeds have as yet emanated from the insurance. We doubt seriously that the committee had such a situation in mind when they made that statement.

It is also interesting to note that not even the present regulation 105 promulgated by the Commissioner pertaining to life insurance, Sec. 81.25, makes any mention of the applicability of any other subdivision of Section 811 as covering the cash surrender value of life insurance policies. Instead it speaks only of the taxability of proceeds under Section 811(c) which governs transfers made in contemplation of death.

We can expect appellant to counter with the argument that since Section 811(e)(2), together with other estate tax provisions relating to community property, was repealed by Section 351(a) of the Revenue Act of 1948, it was not necessary to incorporate such interpretation in the regulation. But appellant concedes that since the repeal of Section 811(e)(2), community property has been includible in a decedent's gross estate only to the extent it is includible therein under Section 811(a) which relates to "decedent's interest" in property (Brief 10). And if appellant's primary thesis is correct that decedent had an interest in one-half the cash surrender value of the policies, it would

seem that repeal of Section 811(e)(2) is immaterial, since we believe that the Commissioner of Internal Revenue will still attempt to collect a tax on the interest of the non-insured spouse in community property states under the present Section 811(a). This, in itself, would indicate that reliance upon Section 811(e)(2) was made originally because the Government erroneously concluded that decedent's interest in the policies was subject to testamentary disposition, and therefore clearly taxable under Section 811(e)(2).

III.

No Interest Was Possessed by Decedent at the Time of Her Death in and to Any Part of the Cash Surrender Value of the Policies on Her Husband's Life so as to Be Taxable Under Section 811 (a).

While appellant makes no contention in its brief that decedent's interest in the cash surrender value is taxable under Section 811(a), we believe that a discussion thereof is warranted since the word "interest" is used in both Subdivisions (e)(2) and (a) of Section 811, and the interpretation given to the word under Subdivision (a) should be accorded the same meaning in Subdivision (e)(2). Subdivision (a) of Section 811 was Section 302(a) of the 1926 Act and has been in effect at all times since 1926. It requires the inclusion in a decedent's estate of all property "to the extent therein of the decedent *at the time of his death.*"

It will be noticed that the terms of the statute are general and there is little chance of having any kind of property excluded if decedent had an *interest* in it.

The principal problem arising under this Section is

whether decedent had an interest in property *at the time of his death*, and what was its extent at that time? The answer to this question has provided most of the difficulties which arise under this section. Under the decisions which have been handed down in cases arising out of this question, we are able to come to certain general conclusions. If the interest had come into existence prior to decedent's death, and was not defeated thereby, the value thereof at the time of death is includible under Section 811(a). Similarly, where the decedent had only a life interest under a transfer by another, there is nothing left to tax at the time of his death. If the interest was one which was accruing to him at the time of his death, and was enforceable by his estate, so much thereof as had accrued at the time of his death is includible. Thus, accrued salaries, commissions, income, etc., are includible. But, where such items are not required to be paid into his estate, they are not includible, even though paid to the executor, and, if the amount or right to anything is contingent upon the happening of some future event, such as the winning of a lawsuit for a client, nothing is includible even though payment may later come to the executor. (See C.C.H. explanation, Federal Estate and Gift Tax Reporter, Paragraph 1300.05.)

In order therefore to answer this question, it is necessary to understand the nature of the subject matter which is here involved.

A policy of life insurance is a contract. It is commonly a tri-partite agreement, to which the parties are the insured, the insurer, and the beneficiary. It is generally defined as a *contract* wherein a person called the

insurer, for a certain sum of money agrees that, if another person, named in the insurance policy as the insured, shall die within the period limited therein, the insurer will pay the sum so specified in the contract according to the terms thereof, to the person designated in the policy as the beneficiary. 1 Couch, Cyc. of Insurance Law, 49 §34; C.J.S. 484, Insurance, §25.

The term "cash surrender value" means the cash value, ascertainable by established rules, of a contract of insurance which has been abandoned and given up for cancellation to the insurer by the person having *contract right* to do so. *In re Welling* (C.A. 7) 113 Fed. 189.

The contract of life insurance differs from most other contracts in that it is not intended primarily for the benefit of the insured, but of some dependent. Its original and fundamental conception is a provision by small periodical contributions to secure a benefit for the family.

The designation of a beneficiary named in a policy of life insurance procured by the insured is in the nature of a declaration of trust. The insured who procures such a policy holds the insurer's promise to pay the proceeds, for the benefit of the beneficiary. And if a beneficiary's interest is terminated by his death before the death of the insured and no other beneficiary is designated to take that interest, it reverts as a lapsed trust to the legal representative of the insured. *Kruger v. John Hancock Mutual Life Insurance Co.* (Mass.) 10 N.E. (2d) 97, 112 A.L.R. 725.

If, therefore, a life insurance policy can be likened

to a trust, it would appear that decedent's only interests in the policy were: (1) the right *during her lifetime* to prevent a change of beneficiary; and (2) the expectancy that if she survived her husband, the insured, she would become entitled to the proceeds.

As to the first, her interest is merely a negative one; namely, the right to object to a change in the policy by the insured. As to the latter, her interest consists of nothing more than an expectancy. Neither interest can be said to have been in existence at the time of her death, since both are automatically defeated by her death.

Her death passed no interest in the ultimate proceeds or to its cash surrender value. Her death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39, 80 L.ed. 29.

There are two Tax Court decisions that are analogous. In *Estate of Gertrude Royce*, 46 B.T.A. 1090, decedent's husband created a trust, reserving to himself the income for life and the right to withdrawals of principal for his maintenance and support, within the discretion of the trustees. After his death the income was to be paid to decedent (his wife) for life with remainders over to his son. In addition to the income, decedent had the right during her lifetime to withdraw any or all of the trust *corpus*. Held, that no part of the trust *corpus* is includible in decedent's gross estate for the purpose of the federal estate tax.

The Commissioner there contended that because, during her life, decedent had complete beneficial ownership of the *corpus* through her right entirely to withdraw it from the trust, it therefore followed that the value of the *corpus* of the trust was includible in her gross estate under the provisions of §302(a) of the Revenue Act of 1926 which provided that the value of the gross estate of the decedent shall be determined by including the "value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—(a) to the extent of the interest therein of the decedent at the time of his death."

The Board of Tax Appeals assumed that Congress had the power to impose the estate tax in such a case, but queried whether Congress had actually exercised that power.

The Board, however, reached the conclusion that there is nothing in the language of the act indicating that Congress intended to include interests of a decedent which terminate at death, and therefore since the rights of the decedent to withdraw the trust *corpus* terminated at her death, neither the trust property nor her intangible rights therein were subject to distribution as part of her estate.

The Board also pointed out that a similar problem was considered by the District Court for the Southern District of New York in *Davis v. United States*, 27 F. Supp. 698, wherein the Commissioner contended that because the decedent had a life interest in certain property, coupled with a power of sale, the value of the property was includible in the decedent's gross estate. The

court, without deciding whether an absolute power of sale did exist, held that such a power would not be an "interest" within the meaning of §302(a), saying:

"For even if the power of sale were a power over an undivided share outright, such a power is not an 'interest' within the meaning of §302(a). That provision deals with property owned by a decedent and passing at death by will or intestacy. Subsequent provisions in §302 deal with property over which a decedent had powers."

The Board also pointed out that the problem of the scope of §302(a) was considered in *Helvering v. Safe Deposit & Trust Co. of Baltimore*, 316 U.S. 56. The decedent in that case, a minor, was the beneficiary of a trust created by his father and was to receive the income until he reached age 28, at which time he was to become the absolute owner of the property. He was given a general testamentary power of appointment over the trust *corpus* which he attempted to exercise when he still lacked testamentary capacity in the state in which he was domiciled. The Commissioner contended that the decedent had an "interest" in the trust *corpus* within the meaning of §302(a). With respect to this argument, the Board had said:

"His power of appointment, which gave him a complete power of testamentary disposition during life, did not, as we read the statutes, constitute an 'interest' under subsection (a). That a subsequent subsection, (f), should treat it as taxable in certain circumstances we think is immaterial. We conceive that the word 'interest' as used in subsection (a), refers to a transferable estate, and not something which, like a life estate or power, ceases altogether on the donee's death. If it includes anything which

ceases at the decedent's death, the inclusion must be in express words."

The Supreme Court reached the same result on this point and held that an unexercised general power of appointment is not an "interest" within the meaning of §302(a).

The *Royce* case was cited as authority in *Susie C. Haggett Estate*, 14 T.C. 325, promulgated March 1, 1950. One of the questions there involved was whether any part of the commuted value of an annuity policy was properly includible as a taxable transfer by the decedent. There, the wife purchased with funds given to her by her husband, an annuity policy in which her husband was the "annuitant." The annuity payments were payable to the wife during the lifetime of the annuitant, and the policy gave her the right to receive the cash surrender value or change the beneficiary without the consent and to the exclusion of the annuitant or any other beneficiary. None of these powers, however, were ever exercised by the wife.

The policy also provided that upon the death of the husband (annuitant), the payments were to be payable to the wife if she survived, and after her death, to certain specified grandchildren.

The wife survived the husband, and she continued to receive the payment in accordance with the policy, but upon her death, the Commissioner sought to include the commuted value of the annuity policy as part of her gross estate.

The Tax Court, in concluding that no amount with

respect to such annuity contract was includible in decedent's estate, said :

“The present decedent's interest in the annuity contract was that of a life beneficiary with the power to surrender the contract and receive its then cash value, and also the power to change the beneficiaries. Neither of these powers was exercised by her during her lifetime. But a mere power with respect to property is not such an interest therein as subjects it to the provisions of §811(a) of the Internal Revenue Code. (Citing the *Royce* case.) No taxable interest in the annuity contract ever belonged to her and, therefore, she did not make any transfer in respect of such contract requiring the inclusion of any amount as the value thereof in her gross estate pursuant to the provisions of §811(c) or (d) of the Code.”

So here, the mere power by the decedent wife of (a) preventing her husband from changing the beneficiaries, or (b) of receiving one-half of the cash surrender value in the event the policies were cancelled prior to her death were mere powers which terminated at her death, and therefore do not constitute such an interest therein which survived her death so as to make them includible in her estate under Section 811(a).

It will be seen from the foregoing decisions that the Board of Tax Appeals and the Supreme Court have construed the word “interest” in Section 811(a) as meaning property owned by a decedent *and passing at death by will or intestacy*, and that it does not refer to something which like a life estate or power, ceases altogether on decedent's death.

We submit that the same meaning should be attached

to the word "interest" wherever used in Section 811 (e)(2), since there can be no logical reason for giving the same word two different meanings in the same section of the code. Therefore when Congress referred to "the interest therein held as community property by the decedent and surviving spouse" it could only mean such interest in community property which would pass *by will or intestacy*, and not to mere powers which ceased altogether upon the death of either spouse.

To say that because the Washington court has held that the husband, who pays the premiums on a life insurance policy from community funds, cannot change the beneficiary without his wife's consent—because it is a community asset which he cannot give away to strangers without consideration—it therefore follows that the wife's interest therein is includible as part of her estate is a non-sequiter. After all, the cash surrender value of an insurance policy is merely a potential asset of the community. It does not become an actual asset until the money is reduced to possession by surrender and cancellation of the policy. Until the occurrence of that condition, the wife during her lifetime, cannot convey her interest to third parties, for obviously such an attempted transfer would defeat *protanto* the right of the ultimate beneficiaries, and would in effect, amount to a testamentary disposition of the proceeds of the policy without effecting a change thereof as required by the contract.

Thus, the court in *In re Towey's Estate*, 22 Wn.(2d) 212, 155 P.(2d) 273, recognizes that if a husband desires to make a testamentary disposition of his one-half of the community property, consisting of the *proceeds* of

insurance policies, he can only do so by making the proceeds of those policies payable to his estate. By the same token, the wife is powerless to convey the proceeds of an insurance policy by will unless she procures a change of beneficiary to her estate. Otherwise, the rights of the ultimate beneficiary, which became vested upon the death of the insured, by virtue of the contract, could become divested through the exercise by either spouse of testamentary disposition.

IV.

CONCLUSION

We conclude by saying that no part of the cash surrender value of the policies on the surviving husband's life was includible as part of the gross estate of decedent wife either under subdivisions (a) or (e)(2) of Section 811, and that therefore the judgment of the District Court in so holding was correct and should be affirmed

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
JOSEPH J. LANZA,
Attorneys for Appellees.

APPENDIX

Internal Revenue Code

SEC. 811. GROSS ESTATE

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.* To the extent therein of the decedent at the time of his death. * * *

(e)(2) (as added by Sec. 402(b)(2) of the Revenue Act of 1942, *supra*). *Community Interests.* To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. * * *

Cross Reference. For treatment of life insurance acquired with community property, see amendment to Sec. 811(g) made by Sec. 404 of this Act. (Revenue Act of 1942 Sec. 402(c).)

* * * * *

(g) *Proceeds of life insurance.* (As amended by Sec. 404 of the Revenue Act of 1942.)

(1) *Receivable by the executor.* To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

No. 13155

United States
Court of Appeals
for the Ninth Circuit.

R. E. OLSEN, et al.,

Appellants,

vs.

POTLATCH FORESTS, INC., a Corporation;
JOHN HANCOCK MUTUAL LIFE INSUR-
ANCE COMPANY; INTERNATIONAL
WOODWORKERS OF AMERICA, Affiliated
With the Congress of Industrial Organizations,
LOCAL No. 10-358, of the International Wood-
workers of America, at Pierce, Idaho, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court,
for the District of Idaho
Northern Division.

FILED

MAR - 5 1952

No. 13155

United States
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R. E. OLSEN, et al.,

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vs.

POTLATCH FORESTS, INC., a Corporation;
JOHN HANCOCK MUTUAL LIFE INSUR-
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LOCAL No. 10-358, of the International Wood-
workers of America, at Pierce, Idaho, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court,
for the District of Idaho
Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS

MILLER & HAWKINS,

WILLIAM S. HAWKINS,

E. L. MILLER,

Coeur d'Alene, Idaho,

For the Appellants.

CLARENCE J. YOUNG,

FRANK C. McCOLLOCH,

800 Pacific Bldg.,

Portland, Oregon;

ELDER, ELDER & SMITH,

R. M. ELDER,

Powell Bldg.,

Coeur d'Alene Idaho;

WM. A. BABCOCK,

402 Public Service Bldg.,

Portland, Oregon,

For the Appellee.

United States District Court, District of Idaho,
Northern Division
No. 1808

POTLATCH FORESTS, INC.,

Plaintiff,

vs.

INTERNATIONAL WOODWORKERS OF
AMERICA, Affiliated With the CONGRESS
OF INDUSTRIAL ORGANIZATIONS, LO-
CAL No. 10-358 of the INTERNATIONAL
WOODWORKERS OF AMERICA, at Pierce,
Idaho, and LOCAL No. 10-361 of the INTER-
NATIONAL WOODWORKERS OF AMER-
ICA of St. Maries, Idaho, and LOCAL No. 10-
119 of the INTERNATIONAL WOODWORK-
ERS OF AMERICA of Coeur d'Alene, Idaho,
and LOCAL No. 10-364 of the INTERNA-
TIONAL WOODWORKERS OF AMERICA
of Lewiston, Idaho; JOHN HANCOCK MU-
TUAL LIFE INSURANCE COMPANY,
THE NORTH IDAHO SERVICE BUREAU,
O. M. HUSTED, R. E. OLSEN, JAMES
M. KING, BERT DAVIDSON, JOHN A.
FOGLESONG, LESTER A. CLEMETSON,
OTIS NUSTAD, FRANK ANDREWS, JOE
BJORNSTAD, CECIL McMILLIN, BEN
JOHNSON, HAROLD A. STANDAHL,
STANLEY C. PARRIOTT, WILMER
MOORE, LELAND SANDE, STANLEY M.
WEST, LYNELLE T. RABUN, HOMER
COGSWELL, HOWARD ELY, GILMAN
MOORE, GAIL L. BARRY, AMOS E. LIBBY,
DAVID NICHOLS, E. A. DUFFIELD, C. C.

BUEGE, W. A. JARDINE, WAYNE DAVIS, W. R. SWEITZER, JR.; ED DENISON, VERNE EATON, WESLEY A. OLSON, CHARLES L. WALTON, ESQ.; W. E. OVE-SON, W. G. PETERS, AXEL HOLMBLAD, LEONARD W. KERBER, JOHN G. Mac-DONALD, W. E. BENSON, LOUIS OLSON, DONALD N. TOSH, CARL W. NYMAN, JOE BRANDVOLD, ROY BJAALAND, C. R. KOCHER, GEORGE GROSE, WILLIAM E. MATTSON, GARDNER TEALL, CHET E. ROATH, JAMES D. WRIGHT, ARNOLD DAVIDSON, JERRY MARKUSON, AL RO-SEN LUND, WILLIAM E. FORMAN, AR-NOLD H. OLSON, GEORGE ERICKSON, ADOLPH OLSON, BERNARD W. VALEN-TINE, HALVOR BRUSTAD, RICHARD H. McCOWEN, JOHN W. PINKLEY, HAROLD SONNICHSEN, HARRY H. FIELDS, BILL OVERBAY, GUST JOHNSON, CRAIG D. WILCOX, HARRY R. FIELDS, JOHN D. MARSON, A. A. FORNESS, H. C. KIEPER, SAM LANORE, L. E. KELLY, M. C. ADAMS, WILLIAM H. HEBERT, CLIFFORD F. ANDERSON, L. E. ACRE, HERBERT C. MENSCH, JOHN HURRELL, LEMUEL R. CEDERBLOOM, ROBERT G. TEALL, FRANK F. KNOX, JOHN CARLSON, VIC-TOR DAHLSTROM, BERTIL KNUTSON, LOUIS R. ACRE, LAWRENCE L. HARMON, JAY W. GIBBS, JOHN A. BARBER, JOHNNY CARLSON, JAMES A. ROE, OLI-

VER BRECTO, OSCAR C. OLSON, FRED L. STEPHENSON, HOWARD STAPLES, HOWARD M. ELDER, LLOYD MOE, JAY B. CARPENTER, ALVIN A. BATCHELDER, EINAR H. HOLMBLAD, CLAUDE H. RAWSON, HENRY O. BJAALAND, GEORGE DILL, PAUL ANTONSON, VICTOR LEINUM, LEONARD E. GERMAN, L. H. MENSCH, RAY JANUSCH, RICHARD R. YOUNG, JOHN W. SPRACKLIN, JOHN GITTEL, ROBERT MARRHEWS, and All Other Production and Maintenance Employees of the Plaintiff Similarly Situated,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

Comes now the above-named plaintiff and as a cause of action against the above-named defendants, alleges:

I.

The above-named plaintiff, the Potlatch Forests, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Maine and authorized to do business in the State of Idaho.

II.

That the above-named defendant, International Woodworkers of America affiliated with the Congress of Industrial Organizations is an international labor organization and has affiliated with it the defendant's Local No. 10-358 of the International

Woodworkers of America at Pierce, Idaho, and Local No. 10-361 of the International Woodworkers of America of St. Maries, Idaho, and Local No. 10-119 of the International Woodworkers of America, of Coeur d'Alene, Idaho, and Local No. 10-364 of the International Woodworkers of America of Lewiston, Idaho, all of such defendants having been designated and certified by the National Labor Relations Board pursuant to National Labor Relations Act as the bargaining agent of the production and maintenance employee of the plaintiff, the Potlatch Forests, Inc.

III.

That the defendant, the John Hancock Mutual Life Insurance Company, is a corporation organized and existing under the laws of Massachusetts and authorized to do business and write insurance within the State of Idaho.

IV.

That the defendant, the North Idaho Service Bureau, is an association with its principal office at Lewiston, Idaho. That the defendant, O. M. Husted, is a resident of Coeur d'Alene, Idaho, and is a practicing physician and surgeon.

V.

That the defendant, R. E. Olson and the other defendants named above are production and maintenance employees of the plaintiff, Potlatch Forests, Inc., employed at the plaintiff's plant at Coeur d'Alene, Idaho. That "all other production and maintenance employees of the plaintiff similarly situ-

ated'' are so named as defendants in said complaint for the reason that it is impracticable to bring approximately 3,000 defendants before this court.

VI.

That the ground upon which the jurisdiction of this court depends is the diversity of citizenship. The plaintiff is a corporation authorized and existing under and by virtue of the laws of the State of Maine. That the defendant, the John Hancock Mutual Life Insurance Company, is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts and the defendants, the International Woodworkers of America, affiliated with the Congress of Industrial Organizations, Local No. 10-358, Local No. 10-361, Local No. 10-119, Local No. 10-364 are all labor organizations operating within the State of Idaho. That all of the other defendants named above are citizens of the State of Idaho and reside within the State of Idaho.

VII.

That the matter of controversy herein exceeds exclusive interest and costs the sum or value of Three Thousand Dollars (\$3,000.00).

VIII.

That on or about the 14th day of July, 1950, the plaintiff, the Potlatch Forests, Inc., entered into a collective bargaining agreement with the defendants, the International Woodworkers of America, affiliated with the Congress of Industrial Organiza-

tions and the defendants, Local No. 10-358 of Pierce, Idaho, Local No. 10-361 of St. Maries, Idaho, Local No. 10-119 of Coeur d'Alene, Idaho, and Local No. 10-364 of Lewiston, Idaho. That a copy of said bargaining agreement is attached hereto marked Exhibit "A" and made a part of this complaint.

IX.

That said bargaining agreement among other things provided in Article XVIII thereof, entitled, Company Financed Health and Welfare, as follows:

"(a) A Company paid Health and Welfare program shall be financed as follows: Wage rates will be increased seven and one-half cents (7½c) per hour, effective June 1, 1950, as to employees on the payroll on the date this agreement is executed, for the purpose of financing and paying for an employee benefit program. For scheduled hourly and piece rate workers the increase shall be converted in accordance with the formula used in the past in making similar conversions.

"(b) Each employee included within the bargaining unit under this agreement, upon execution of this agreement in his behalf by the Union as his duly certified collective bargaining agent, hereby authorizes and directs the Company to deduct from his earnings each month the sum of 7½c for each hour worked by him or 60c per day for scheduled hourly employees and to pay said sum to such insurance carrier or carriers or hospital or physicians' organization legally author-

ized to do business in the State of Idaho as the Union or its authorized representatives may designate to be used exclusively for social benefits to inure to the benefit of the individual employee only. The Union shall notify the Company of the carrier or carriers or hospital or physicians' organization designated by it and the amount to be paid to each. The Company will cooperate with the Union and the insurance carrier or hospital or physicians' organization in securing necessary information for coverage. No employee, or former employee, shall have any claim, right, interest in or demand to said 7½c or said 60c, or any part thereof, or in the provisions of Article XVIII, except he shall receive the social benefits, insurance, medical and surgical coverage, and dividends or refunds as provided under the policy or policies issued by the carrier or carriers as a result of negotiations by the Union with the carrier or carriers. No employee or former employee shall have any right or cause of suit or action and none shall be maintained under the provisions of this working agreement or otherwise against the Company or the Union by reason of the provisions of Article XVIII.

“(c) Effective as soon as permitted by its present policies the Company shall forthwith terminate any existing employee social benefit programs to which the employee contributes. Under the provisions of paragraph (b) of this Article, the employee also authorizes a deduction from

his earnings of a sum equal to the amount heretofore contributed by the Company to such existing programs, from and after the effective date of this Article for the purpose of defraying the cost of that program from that date until actually terminated.

“(d) It is the intention of the Company and the Union that the foregoing program is in lieu of any similar or related programs requiring employer contributions under State and/or Federal law now existing or which may be hereafter enacted, and the parties hereto agree to amend the foregoing program, if necessary, from time to time to conform to and comply with any such legislation. If the foregoing is found to be in conflict with any Federal or State law, the parties agree to amend it to conform to the same.”

X.

That beginning on the 1st day of June, the Potlatch Forests, Inc., in accordance with provision XVIII of said bargaining agreement deducted from its 3,164 employees the sum of \$.071½ an hour and sum of \$.60 per days from the scheduled hourly employees. That upon instructions from the International Woodworkers of America, affiliated with the Congress of Industrial Organizations and its above-named affiliated locals, the Potlatch Forests, Inc., paid over the moneys so deducted:

a. The sum of \$3.50 per month for each employee to the above-named defendant, the North Idaho Medical Service Bureau except the em-

ployees of the above-named plaintiff employed at its Coeur d'Alene Plant and for such employees under the instructions received paid the sum of \$2.50 per month for each employee to Dr. O. M. Husted of Coeur d'Alene, Idaho, named above as a defendant.

b. The balance of said sum deducted from each employee was paid by the plaintiff under the instructions received from the Union to the defendant, the John Hancock Mutual Life Insurance Company.

That copies of the instructions received from the defendant, the International Woodworkers of America and the above-named affiliated Locals are attached hereto and marked Exhibits "B," "C," "D" and "E" and made a part of this complaint.

XI.

That the plaintiff is informed and believes and therefore alleges that the defendant, the International Woodworkers of America, affiliated with the Congress of Industrial Organizations, and its affiliated Locals, named as defendants above, entered into a contract for group insurance with the John Hancock Mutual Life Insurance Company covering all of the employees within the bargaining units of plaintiff's operations for life, accident, and health insurance. That said policy of insurance took effect on the 1st day of July, 1950.

XII.

That on September 6, 1950, the above-named plaintiff was served with a demand signed by 109 of its employees requesting that no further deductions be made on their earnings for the health and welfare program and that such sums heretofore deducted be returned to them immediately. That such employees signing said demand have been made defendants herein. That defendant unions named above contend that under Paragraph XVIII of Exhibit "A" the plaintiff is required to deduct the \$.07½ per hour from each hour worked by all production and maintenance employees and to pay the sum out as the union may direct as set forth in Paragraph X above. That the above-named defendant employees who signed the demand, being Exhibit "F," attached hereto and made a part hereof, contend that the plaintiff has no right or authority to deduct said \$.07½ from their earnings without an individual authorization signed by the employee. That none of said defendant employees or any of plaintiff's employees similarly situated have signed individual's authorizations for said deduction.

That under the terms of Exhibit "A," and Paragraph XVIII in particular, the plaintiff has during the months of June, July, and August deducted from the earnings of its employees the sum of \$117,-197.00 and paid said sum out under direction from the union as set forth more particularly in Paragraph X above. That during the life of the contract set out as Exhibit "A" the plaintiff will de-

duct from the earnings of its employees and pay out in accordance with instructions from the union approximately \$770,000.00. That the average deduction for each employee in the bargaining unit of plaintiff's operation is approximately \$17.00 per month.

XIII.

That plaintiff contends that said bargaining agreement, plaintiff's Exhibit "A," is valid and binding upon the company and that individual authorizations from each employee is not necessary or required in view of Paragraph XVIII of the bargaining agreement set out in Paragraph IX above wherein the bargaining agent of the employees authorizes the deduction to be made from the earnings of each production and maintenance employee within the bargaining unit, but that the claim of the above-named employees named as defendants and all other employees similarly situated, that Article XVIII of said contract is not valid and that individual authorizations are necessary, presents a matter of actual controversy between the parties and raises a question of the validity of the whole of said agreement.

Wherefore, plaintiff prays for a declaratory judgment finding that said contract hereinabove described is wholly valid and enforceable and unaffected by any law of the State of Idaho and of the United States; and that under said contract the plaintiff is authorized to make the deduction from

its employee's earnings and pay said sum out in accordance with the directions of the defendant unions, and for such other relief as the court may direct.

/s/ ROBT. H. ELDER,

/s/ R. M. ELDER,

/s/ SIDNEY E. SMITH,

Attorneys for Plaintiff.

EXHIBIT "B"

July 14, 1950

Potlatch Forests, Inc.

Name of Company

Lewiston, Idaho

Address

Dear Sirs:

Local Union No. 10-358 IWA hereby certified acceptance of the recommendation of the Northwest Regional Negotiating Committee for a Health and Welfare and Paid Holiday Program.

John Hancock Mutual Life Insurance Company has been contracted to underwrite the coverage effective July 1, 1950. We hereby authorize you to deduct and forward the monthly payments of 7½¢ for each hour worked since June 1, 1950, to John Hancock Mutual Life Insurance Company, 310 Governor Bldg., Portland, Oregon.

Employees who have worked during the month of June, 1950, and have had wages of 7½¢ per hour

withheld for such Health and Welfare Program, but who have terminated their employment prior to July 1, 1950, will not be covered when the plan becomes effective on July 1, 1950. The amounts withheld by you, from the wages of such employees, at the rate of 7½¢ per hour, shall be repaid to such employees, as they are not protected in any way by any coverage whatever under such Health and Welfare Program during the month of June.

The Company is hereby authorized to deduct from the above amount and pay to the North Idaho Medical Bureau, \$3.50 per month per employee in accordance with their contract.

J. M. RHODES, Fin. Sec.

Signature.

LOCAL 10-358, Pierce, Idaho,

Local Union.

EXHIBIT "C"

July 14, 1950.

Potlatch Forests, Inc.

Name of Company

Lewiston, Idaho

Address

Dear Sirs:

Local Union No. 361 IWA hereby certifies acceptance of the recommendation of the Northwest Regional Negotiating Committee for a Health and Welfare and Paid Holiday Program.

John Hancock Mutual Life Insurance Company has been contracted to underwrite the coverage effective July 1, 1950. We hereby authorize you to deduct and forward the monthly payments of 71½c for each hour worked since June 1, 1950, to John Hancock Mutual Life Insurance Company, 310 Governor Bldg., Portland, Oregon.

Employees who have worked during the months of May and/or June, 1950, and have had wages of 71½c per hour withheld for such Health and Welfare Program, but who have terminated their employment prior to July 1, 1950, will not be covered when the plan becomes effective on July 1, 1950. The amounts withheld by you, from the wages of such employees, at the rate of 71½c per hour, shall be repaid to such employees, as they are not protected in any way by any coverage whatever under such Health and Welfare Program during the months of May and/or June.

The Company is hereby authorized to deduct from the above amount and pay to the N. I. M. S., \$3.50 per month per employee in accordance with their contract.

WM. SCHWARTZMAN,
Signature.

10-361,

Local Union.

EXHIBIT "D"

July 19, 1950.

Potlatch Forests, Inc.

Name of Company

Lewiston, Idaho

Address

Dear Sirs:

Local Union No. 364, IWA, hereby certifies acceptance of the recommendation of the Northwest Regional Negotiating Committee for a Health and Welfare and Paid Holiday Program.

John Hancock Mutual Life Insurance Company has been contracted to underwrite the coverage effective July 1, 1950. We hereby authorize you to deduct and forward the monthly payments of 7½¢ for each hour worked since June 1, 1950, to John Hancock Mutual Life Insurance Company, 310 Governor Bldg., Portland, Oregon.

Employees who have worked during the month of June, 1950, and have had wages of 7½¢ per hour withheld for such Health and Welfare Program, but who have terminated their employment prior to July 1, 1950, will not be covered when the plan becomes effective on July 1, 1950. The amounts withheld by you, from the wages of such employees, as they are not protected in any way by any coverage whatever under such Health and Welfare Program during the month of June.

The Company is hereby authorized to deduct from

the above amount and pay to the North Idaho Medical Bureau, \$3.50 per month per employee in accordance with their contract.

HERBERT P. JENKINS,

Recd. Sect.

Signature.

10-364, IWA-CIO,

Local Union.

EXHIBIT "E"

August 31, 1950.

Potlatch Forests, Inc.—Rutledge Unit

Name of Company

Coeur d'Alene, Idaho

Address

Dear Sirs:

Local Union No. 119, IWA., hereby certifies acceptance of the recommendation of the Northwest Regional Negotiating Committee for a Health and Welfare and Paid Holiday Program.

John Hancock Mutual Life Insurance Company has been contracted to underwrite the coverage effective July 1, 1950. We hereby authorize you to deduct and forward the monthly payments of 7½¢ for each hour worked since May 1, 1950, to John Hancock Mutual Life Insurance Company, 310 Governor Bldg., Portland, Oregon.

Employees who have worked during the months of May and/or June, 1950, and have had wages of $7\frac{1}{2}c$ per hour withheld for such Health and Welfare Program, but who have terminated their employment prior to July 1, 1950, will not be covered when the plan becomes effective on July 1, 1950. The amounts withheld by you, from the wages of such employees, at the rate of $7\frac{1}{2}c$ per hour, shall be repaid to such employees, as they are not protected in any way by any coverage whatever under such Health and Welfare Program during the months of May and/or June.

The Company is hereby authorized to deduct from the above amount and pay to Dr. O. M. Husted, \$2.50 per month per employee in accordance with their contract.

/s/ CECIL W. JOHNSON,
Signature.

IWA-CIO Local 10-119,
Local Union.

EXHIBIT "F"

Sept. 6, 1950.

We the undersigned, employees of the Potlatch Forests, Inc. (Rutledge Unit) request that nothing more be deducted from our pay checks in favor of the Health and Welfare Fund; and that such sums that have already been deducted be returned.

R. E. Olsen	W. A. Jardine
James M. King	Wayne Davis
Bert Davidson	W. R. Sweitzer, Jr.
John A. Foglesong	Ed Denison
Lester A. Clemetson	Verne Eaton
Otis Nustad	Wesley A. Olson
Frank Andrews	Charles L. Walton, Esq.
Joe Bjornstad	W. E. Oveson
Cecil McMillin	W. G. Peters
Ben Johnson	Axel Holmblad
Harold A. Standahl	Leonard W. Kerber
Stanley C. Parriott	John G. MacDonald
Wilmer Moore	O. E. Benson
Leland Sande	Louis Olson
Stanley M. West	Donald N. Tosh
Lynelle T. Rabun	Carl W. Nyman
Homer Cogswell	Joe Brandvold
Howard Ely	Roy Bjaaland
Gilman Moore	C. R. Kochel
Gail L. Barry	George Grose
Amos E. Libby	William E. Mattson
David Nichols	Gardner Teall
E. A. Duffield	Chet E. Roath
C. C. Buege	James D. Wright

Arnold Davidson	Herbert C. Mensch
Jerry Markuson	John Hurrell
Al Rosenlund	Lemuel R. Cederbloom
William E. Forman	Louis R. Acre
Arnold H. Olson	Lawrence L. Harmon
George Erickson	Jay W. Gibbs
Adolph Olson	John A. Barber
Bernard W. Valentine	Johnny Carlson
Halvor Brustad	James A. Roe
Richard H. McCowen	Oliver Brecto
Robert G. Teall	Oscar C. Olson
Frank F. Knox	Fred L. Stephenson
John Carlson	Howard Staples
Victor Dahlstrom	Howard M. Elder
Bertil Knutson	Lloyd Moe
John W. Pinkley	Jay B. Carpenter
Harold Sonnichsen	Alvin A. Batchelder
Harry H. Fields	Einar H. Holmblad
Bill Overbay	Claude H. Rawson
Gust Johnson	Henry O. Bjaaland
Craig D. Wilcox	George Dill
Harry R. Fields	Paul Antonson
John D. Marsan	Victor Leinum
A. A. Forness	Leonard E. German
H. C. Kieper	L. H. Mensch
Sam Lenore	Ray Janusch
L. E. Kelly	Richard R. Young
M. C. Adams	John W. Spracklin
William H. Hebert	John Gittel
Clifford F. Anderson	Robert Matthews
L. E. Acre	

[Endorsed]: Filed November 13, 1950.

[Title of District Court and Cause.]

ANSWER

Come now the following defendants: R. E. Olsen, James M. King, Bert Davidson, John A. Foglesong, Lester A. Clemetson, Otis Nustad, Frank Andrews, Joe Bjornstad, Cecil McMillin, Ben Johnson, Harold A. Standahl, Stanley C. Parriott, Wilmer Moore, Leland Sande, Stanley M. West, Lynelle T. Rabun, Homer Cogswell, Howard Ely, Gilman Moore, Gail L. Barry, Amos E. Libby, David Nichols, E. A. Duffield, C. C. Buege, W. A. Jardine, Wayne Davis, W. R. Sweitzer, Jr., Ed Denison, Verne Eaton, Wesley A. Olson, Charles L. Walton, Esq., W. E. Oveson, W. G. Peters, Axel Holmblad, Leonard W. Kerber, John G. MacDonald, W. E. Benson, Louis Olson, Donald N. Tosh, Carl W. Nyman, Joe Brandvold, Roy Bjaaland, C. R. Kochel, George Grose, William E. Mattson, Gardner Teall, Chet E. Roath, James D. Wright, Arnold Davidson, Jerry Markuson, Al Rosenlund, William E. Forman, Arnold H. Olson, George Erickson, Adolph Olson, Bernard W. Valentine, Halvor Brustad, Richard H. McCowen, John W. Pinkley, Harold Sonnichsen, Harry H. Fields, Bill Overbay, Gust Johnson, Craig D. Wilcox, Harry R. Fields, John D. Marson, A. A. Forness, H. C. Kieper, Sam Lanore, L. E. Kelly, M. C. Adams, William H. Hebert, Clifford F. Anderson, L. E. Acre, Herbert C. Mensch, John Hurrell, Lemuel R. Cederbloom, Robert G. Teall, Frank E. Knox, John Carlson, Victor Dahlstrom, Bertil Knutson, Louis R.

Acre, Lawrence L. Harmon, Jay W. Gibbs, John A. Barber, Johnny Carlson, James A. Roe, Oliver Brecto, Oscar C. Olson, Fred L. Stephenson, Howard Staples, Howard M. Elder, Lloyd Moe, Jay B. Carpenter, Alvin A. Batchelder, Einar H. Holmblad, Claude H. Rawson, Henry O. Bjaaland, George Dill, Paul Antonson, Victor Leinum, Leonard E. German, L. H. Mensch, Ray Janusch, Richard R. Young, John W. Spracklin, John Gittel and Robert Marrhews; and in Answer to Plaintiff's Complaint admit, deny, and allege as follows:

I.

Admit the allegations of Paragraph I of plaintiff's complaint.

II.

Admit the allegations of Paragraph II of plaintiff's complaint.

III.

Admit the allegations of Paragraph III of plaintiff's complaint.

IV.

Admit the allegations of Paragraph IV of plaintiff's complaint.

V.

Answering Paragraph V of plaintiff's complaint these answering defendants' admit that they are production and maintenance employees of the plaintiff Potlatch Forests, Inc., and employed at the plaintiff's plant at Coeur d'Alene, Idaho, a majority of whom are not members of the Unions or Locals herein referred to, but have no information or

belief as to other production and maintenance employees as to whether or not they are similarly situated and have no knowledge or information as concerns the practicability of bringing other defendants before this Court.

VI.

Answering Paragraph VI of plaintiff's complaint these answering defendants admit that the jurisdiction of this Court is predicated upon diversity of citizenship, and that this Court has jurisdiction herein, and denies the remaining allegations of Paragraph VI.

VII.

These answering defendants' admit the allegations of Paragraph VII of plaintiff's complaint, as to all of said defendants' herein answering, but deny that the amount involved exceeds \$3,000.00 as to any individual defendant herein named, and appearing in this Answer.

VIII.

Answering Paragraph VIII of plaintiff's complaint, these answering defendants' admit that the plaintiff Potlatch Forests, Inc., entered into a collective bargaining agreement as evidenced by Exhibit A attached to and made a part of the Complaint with the defendants therein named.

IX.

These defendants admit that Article XVIII entitled "Company Financed Health and Welfare"

contains the provisions set forth in Paragraph IX of plaintiff's complaint, but deny that they are binding upon or have any effect upon these answering defendants' and affirmatively allege that they have no force or effect as to any employee therein referred to who fails, neglects or refuses to sign any authorization for the deduction of such monies therein defined for the purposes therein set forth.

X.

The defendants admit that deductions have been made pursuant to said alleged bargaining agreement in the amount of 7½c an hour and the sum of \$.60 per day for scheduled hourly employees, but having no knowledge as to the application of such deductions, or where they have gone, deny the remainder of the allegations of said complaint and further deny any knowledge as to instructions received from the defendant International Woodworkers of America.

XI.

These answering defendants admit that the International Woodworkers of America affiliated with the Congress of Industrial Organizations and its affiliated Locals, defendants herein, entered into a contract with the John Hancock Mutual Life Insurance Company with respect to insurance, but deny that said contract covers these answering defendants or that the defendant, International Woodworkers of America, affiliated with the Congress of Industrial Organizations and its affiliated Locals, had any authority to enter into any contract with John Hancock Mutual Life Insurance Company as

to these answering defendants, and have never been authorized so to do, and deny that the policy of insurance took effect as to these answering defendants on the 1st day of July, 1950, or at any other time.

XII.

These answering defendants admit that on September 6, 1950, they caused to be served upon the plaintiff a Demand signed by these answering defendants requesting that no further deductions be made on their earnings for the Health and Welfare Program and that such sums heretofore deducted be returned to them immediately, and deny that the plaintiff is required to deduct the sum of 7½¢ per hour from each hour worked by these answering defendants, or any other sum to pay out as the Union may direct as set forth in Paragraph X of plaintiff's complaint, and these defendants contend and claim that the plaintiff has no right or authority to deduct the said 7½¢ from their earnings or any other sum without an individual authorization signed by the employee, and admit that these answering defendants and each and all of them have refused to sign individual authorizations but deny any knowledge as to anyone else similarly situate. These answering defendants deny because of the lack of knowledge or information Paragraph II of Paragraph XII of plaintiff's complaint.

XIII.

These answering defendants deny each and every allegation of Paragraph XIII of plaintiff's complaint, except that a controversy exists between the

parties and raises a question as to the validity of the whole of said agreement, and particularly that portion with respect to any deductions under the alleged Article XVIII of said alleged contract.

Wherefore, these defendants pray that a Judgment be entered herein holding invalid and unenforceable any contract between the International Woodworkers of America, affiliated with the Congress of Industrial Organizations and its affiliated Locals, named herein, and adjudging that the plaintiff and said International Woodworkers of America and its affiliates have no right or authority to enter into any such contract, or that the plaintiff has any authority by virtue of such contract or otherwise to deduct the sum of 7½¢ per hour or any other sum from their earnings without an individual authorization signed by the employee consisting of these answering defendants, or to pay out in accordance with the directions of the defendant Unions any other sum unless specifically authorized by these individual answering defendants; and for such other and further relief as to the Court may seem just and proper.

Dated this 22nd day of January, 1951.

/s/ W. S. HAWKINS,

Attorney for the Above-Named Answering Defendants. Residence & P. O. Address: Coeur d'Alene, Idaho.

[Endorsed]: Filed February 28, 1951.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated between the parties having appeared in this action as follows:

I.

The above-named plaintiff, the Potlatch Forests, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Maine and authorized to do business in the State of Idaho.

The plaintiff, Potlatch Forests, Inc., is engaged in the business of logging and the manufacturing of lumber and lumber products. It has its principal office and place of business at Lewiston, Idaho. It operates saw mills and other manufacturing facilities at Lewiston, Potlatch, and Coeur d'Alene, Idaho, and logging operations in the vicinity of Bovill and Headquarters, Idaho. The greatest part of its products is sold and shipped to points outside the state of Idaho. The plaintiff is engaged in interstate commerce within the meaning of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. The Collective Bargaining Agreement between the plaintiff and the defendant unions and any disputes which may arise there under affect interstate commerce within the meaning of the National Labor Relations Act as amended.

II.

The above-named defendant, International Woodworkers of America affiliated with the Congress

of Industrial Organizations, is an international labor organization and has affiliated with it the defendant's Local No. 10-358 of the International Woodworkers of America at Pierce, Idaho, and Local No. 10-361 of the International Woodworkers of America of St. Maries, Idaho, and Local No. 10-119 of the International Woodworkers of America, of Coeur d'Alene, Idaho, and Local No. 10-364 of the International Woodworkers of America of Lewiston, Idaho, all of such defendants having been designated and certified by the National Labor Relations Board pursuant to National Labor Relations Act as the bargaining agent of the production and maintenance employees of the plaintiff, the Potlatch Forests, Inc.

III.

The defendant, the John Hancock Mutual Life Insurance Company, is a corporation organized and existing under the laws of Massachusetts and authorized to do business and write insurance within the state of Idaho.

IV.

The defendant, the North Idaho Service Bureau, is an association with its principle office at Lewiston, Idaho. That the defendant, O. M. Husted, is a resident of Coeur d'Alene, Idaho, and is a practicing physician and surgeon.

V.

The defendant, R. E. Olson and the other defendants named above are production and mainten-

ance employees of the plaintiff, Potlatch Forests, Inc., employed at the plaintiff's plant at Coeur d'Alene, Idaho.

VI.

The ground upon which the jurisdiction of this court depends is the diversity of citizenship. The plaintiff is a corporation authorized and existing under and by virtue of the laws of the state of Maine. That the defendant, the John Hancock Mutual Life Insurance Company, is a corporation organized and existing under and by virtue of the laws of the state of Massachusetts, and the defendants, the International Woodworkers of America affiliated with the Congress of Industrial Organizations, Local No. 10-358, Local No. 10-361, Local No. 10-119, Local No. 10-364 are all labor organizations operating within the State of Idaho. That all of the other defendants named above are citizens of the state of Idaho and reside within the state of Idaho.

VII.

The matter in controversy herein exceeds, exclusive interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

VIII.

On or about the 14th day of July, 1950, the plaintiff, the Potlatch Forests, Inc., entered into a collective bargaining agreement with the defendants, the International Woodworkers of America affiliated with the Congress of Industrial Organizations, and the defendants, Local No. 10-358 of Pierce,

Idaho; Local No. 10-361 of St. Maries, Idaho; Local No. 10-119 of Coeur d'Alene, Idaho; and Local No. 10-364 of Lewiston, Idaho. That a copy of said bargaining agreement is attached to plaintiff's complaint marked Exhibit "A" and by reference is hereby made a part of this stipulation.

IX.

That said bargaining agreement, among other things, provided in Article XVIII thereof, entitled, Company Financed Health and Welfare, as follows:

(a) A Company paid Health and Welfare program shall be financed as follows: Wage rates will be increased seven and one-half cents ($7\frac{1}{2}c$) per hour, effective June 1, 1950, as to employees on the pay roll on the date this agreement is executed, for the purpose of financing and paying for an employee benefit program. For scheduled hourly and piece rate workers the increase shall be converted in accordance with the formula used in the past in making similar conversions.

(b) Each employee included within the bargaining unit under this agreement, upon execution of this agreement in his behalf by the Union as his duly certified collective bargaining agent, hereby authorizes and directs the Company to deduct from his earnings each month the sum of $7\frac{1}{2}c$ for each hour worked by him or 60c per day for scheduled hourly employees

and to pay said sum to such insurance carrier or carriers or hospital or physicians' organization legally authorized to do business in the state of Idaho as the Union or its authorized representatives may designate to be used exclusively for social benefits to inure to the benefit of the individual employee only. The Union shall notify the Company of the carrier or carriers or hospital or physicians' organization designated by it and the amount to be paid to each. The Company will cooperate with the Union and the insurance carrier or hospital or physicians' organization in securing necessary information for coverage. No employee, or former employee, shall have any claim, right, interest in or demand to said 7½c or said 60c, or any part thereof, or in the provisions of Article XVIII, except he shall receive the social benefits, insurance, medical and surgical coverage, and dividends or refunds as provided under the policy or policies issued by the carrier or carriers as a result of negotiations by the Union with the carrier or carriers. No employee or former employee shall have any right or cause of suit or action and none shall be maintained under the provisions of this working agreement or otherwise against the Company or the Union by reason of the provisions of Article XVIII.

(c) Effective as soon as permitted by its

present policies the Company shall forthwith terminate any existing employee social benefit programs to which the employee contributes. Under the provisions of paragraph (b) of this Article, the employee also authorizes a deduction from his earnings of a sum equal to the amount heretofore contributed by the Company to such existing programs, from and after the effective date of this Article for the purpose of defraying the cost of that program from that date until actually terminated.

(d) It is the intention of the Company and the Union that the foregoing program is in lieu of any similar or related programs requiring employer contributions under State and/or Federal law now existing or which may be hereafter enacted, and the parties hereto agree to amend the foregoing program, if necessary, from time to time to conform to and comply with any such legislation. If the foregoing is found to be in conflict with any Federal or State law, the parties agree to amend it to conform to the same.

X.

Beginning on the 1st day of June, the Potlatch Forests, Inc., in accordance with provision XVIII of said bargaining agreement deducted from its 3,164 employees the sum of \$.07½ an hour and the sum of \$.60 per day from the scheduled hourly employees. That upon instructions from the International Woodworkers of America affiliated with

the Congress of Industrial Organizations and its above-named affiliated locals, the Potlatch Forests, Inc., in accordance with the terms of the contract, paid over the moneys so deducted:

a. The sum of \$3.50 per month for each employee to the above-named defendant, the North Idaho Medical Service Bureau except the employees of the above-named plaintiff employed at its Coeur d'Alene Plant and for such employees under the instructions received paid the sum of \$2.50 per month for each employee to Dr. O. M. Husted of Coeur d'Alene, Idaho, named-above defendant. A total of \$92,652.47 has been paid the Bureau and \$3,712.90 to Husted to date.

b. The balance of said sum deducted from each employee was paid by the plaintiff under the instructions received from the Union to the defendant, the John Hancock Mutual Life Insurance Company, a total to date of \$311,234.78.

That copies of the instructions received from the defendant, the International Woodworkers of America and the above-named affiliated locals, are attached to plaintiff's complaint and marked Exhibits "B," "C," "D," and "E" and by reference are made a part of this stipulation.

XI.

The International Woodworkers of America affiliated with the Congress of Industrial Organizations

and its affiliated Locals, named as defendants above, entered into a contract for group insurance with the John Hancock Mutual Life Insurance Company covering all of the main employees within the bargaining unit of plaintiff's operations for life, accident, and health insurance. That said policy of insurance took effect on the 1st day of June, 1950, and a true and correct copy of said policy of insurance as amended is attached hereto marked Exhibit "A" and made a part of this stipulation.

XII.

That on September 6, 1950, the above-named plaintiff was served with a demand signed by 109 of its employees requesting that no further deductions be made on their earnings for the health and welfare program and that such sums heretofore deducted be returned to them immediately. That such employees signing said demand have been made defendants herein. That defendant unions named above contend that under Paragraph XVIII of Union Bargaining Agreement the plaintiff is required to deduct the \$.071½ per hour from each hour worked by all production and maintenance employees and to pay the sum out as the union may direct as set forth in Paragraph X above. That the above-named defendant employees who signed the demand, contend that the plaintiff has no right or authority to deduct said \$.071½ from their earnings without an individual authorization signed by the employee. That none of plaintiff's employees

have signed individual's authorizations for said deduction.

Under the terms of the union bargaining agreement, and Paragraph XVIII in particular, the plaintiff has during the months of June, 1950, to March, 1951, both inclusive, deducted from the earnings of its employees the sum of \$407,600.15 and paid said sum out under direction from the union as set forth more particularly in Paragraph X above. That during the life of the contract the plaintiff will deduct from the earnings of its employees and pay out in accordance with instructions from the union approximately \$770,000.00.

XIII.

Plaintiff contends that said bargaining agreement is valid and binding upon the company and that individual authorizations from each employee are not necessary or required in view of Paragraph XVIII of the bargaining agreement set out in Paragraph IX above wherein the bargaining agent of the employees authorizes the deduction to be made from the earnings of each production and maintenance employee with the bargaining unit, but that the claim of the above-named employees named as defendants and all other employees similarly situated, that Article XVIII of said contract is not valid and that individual authorizations are neces-

sary, presents a matter of actual controversy between the parties and raises a question of the validity of Article XVIII of said agreement.

POTLATCH FORESTS, INC.,

By its Attorneys:

/s/ ROBT. H. ELDER,

/s/ R. N. ELDER,

/s/ SIDNEY E. SMITH.

INTERNATIONAL WOODWORKERS OF
AMERICA and Affiliated LOCALS No. 10-358,
No. 10-361, No. 10-119, and No. 10-364.

By their Attorneys:

/s/ WM. A. BABCOCK,

JOHN HANCOCK MUTUAL
LIFE INSURANCE CO.

By its Attorneys:

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ FRANK C. McCOLLOCH,

/s/ CLARENCE J. YOUNG,

/s/ RAY E. DURHAM.

DEFENDANT EMPLOYEES OF RUTLEDGE
UNIT AS LISTED IN EXHIBIT "F" OF
PLAINTIFF'S COMPLAINT.

By their Attorney:

/s/ WM. S. HAWKINS.

EXHIBIT A

This Policy Provides Group Insurance Coverage
as Indicated Below

No. 7968-GMC

John Hancock Mutual
Life Insurance Company

Boston, Massachusetts
Incorporated 1862

hereby agrees with International Woodworkers of America—CIO, Portland, Oregon (herein called the Union) to make the payments provided herein, subject to all the conditions and provisions of this Policy.

Only the coverages which are checked in the following Schedule of Group Insurance Coverages and for which a premium rate is shown in the Section hereof entitled "General Provisions" are provided by this Policy on its effective date; other coverages may be added by amendment after said effective date.

Schedule of Group Insurance Coverages

- ☒ Life.
- ☒ Accidental Death and Dismemberment.
- ☒ Accident and Sickness.
- ☒ Hospital Expense for Employees.
- ☒ Surgical Operation Expense for Employees.
- ☒ Medical Expense for Employees.

Exhibit A—(Continued)

- ☒ Laboratory and X-Ray Examination Expense for Employees.
- ☒ Hospital Expense for Dependents.
- ☒ Surgical Operation Expense for Dependents.
- ☒ Medical Expense for Dependents.
- ☒ Laboratory and X-Ray Examination Expense for Dependents.
- ☒ Supplemental Accident Expense for Employees.

This Policy is issued in consideration of the application of the Union, and of the payment by the Union of the initial premium due on July 1, 1950, which is the effective date of this Policy, and of the payment thereafter by the Union during the continuance of this Policy of premiums due on the first day of each succeeding calendar month.

The first anniversary of this Policy shall be April 1, 1951, and subsequent policy anniversaries shall be the first day of April of each year thereafter.

This Policy is delivered in Oregon and is governed by the laws of that jurisdiction.

The conditions and provisions hereinafter set forth are hereby made a part of this Policy.

In Witness Whereof, the John Hancock Mutual Life Insurance Company has, by its President and Secretary, executed this Policy and caused it to

Exhibit A—(Continued)

be duly countersigned at Boston, Massachusetts, on
this.....day of....., 19.....

/s/ PAUL F. CLARK,
President.

/s/ ELMER L. FRENCH,
Secretary.

.....,
Resident Agent.

Countersigned:

/s/ HAROLD V. BROWN,
Registrar.

Accepted by: The Union.

By,
Title.

Annual Surplus Distribution as Accrued
and Apportioned

Form 1770.3-GMC Ed. 7-50.

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Section A

Group Life Insurance

Insuring Clause. Subject to the terms and conditions of this Policy applicable to this coverage, upon receipt of due proof at the Home Office of the Company of the death of an employee insured for Life Insurance under this Policy, the Company shall pay to a beneficiary, other than any Employer, the amount of Life Insurance in force under this

Exhibit A—(Continued)

Section A—(Continued)

Policy on the life of such employee at the date of death, in accordance with the provision entitled "Amounts of Insurance" contained herein.

Waiver of Premium Benefit in the Event of Permanent and Total Disability. The Company will waive the payment of further premiums on the amount of insurance in force on the life of an employee on the last day on which he is actively at work and will, upon the employee's death, pay the amount of said insurance to the beneficiary, provided:

(a) the employee ceases active work on account of permanent and total disability resulting from bodily injuries or disease which prevents the employee from engaging in any business or occupation and from performing any work for compensation or profit;

(b) such disability is continuance until the death of the employee;

(c) the employee ceases active work before attaining age 60;

(d) the employee furnishes the Company at its Home Office, after nine months but within twelve months following the date he ceases active work, written proof on the Company's prescribed forms that he is permanently and totally disabled as defined in (a) of this provision, and has been so disabled continuously since the date he ceased active work. At the

Exhibit A—(Continued)

Section A—(Continued)

time the employee furnishes such proof of disability the Company will endorse his certificate to indicate acknowledgment of receipt of said proof and the date upon which it was received, such date to be referred to as Original Date of Endorsement;

(e) the employee furnishes the Company at its Home Office with written proof on the Company's prescribed forms of continued permanent and total disability within the three months immediately prior to each anniversary of the Original Date of Endorsement during the life of the employee; the Company will endorse the employee's certificate each year when such proof of continued permanent and total disability is furnished;

(f) written proof on the Company's prescribed forms of the employee's death is furnished to the Company at its Home Office within one year of the death of the employee. In the event of death of the employee within one year from the date of termination of employment and before any such proof of disability has been submitted, written proof on the Company's prescribed forms that the employee was continuously disabled from the date of termination of his employment to the date of death shall be

Exhibit A—(Continued)

Section A—(Continued)

furnished to the Company within one year after the death of said employee;

(g) no death benefit is payable as set forth in "C" of the provision entitled "Conversion Privilege."

The Company shall have the right to have any employee who submits proof of disability in accordance with this provision examined at any time by physicians designated by it; provided, that after such disability shall have continued for two full years, such examination will not be required more often than once in each subsequent year. [A-1*]

Waiver of Premium Benefit in the Event of Permanent and Total Disability. (Continued) All rights of an employee under this provision shall cease on the earliest of the following dates:

(1) the date of cessation of the employee's permanent and total disability;

(2) the date the employee engages in any business or occupation or performs any work for compensation or profit, whether or not the employee continues to be permanently and totally disabled;

(3) the last day of any twelve-month period of continued insurance under this provision, if the proof of disability required by subsection (e) of this provision is not furnished

[Page numbering appearing on original certified copy.]

Exhibit A—(Continued)

Section A—(Continued)

within the three-month period specified therein;

(4) the date on which the employee refuses to submit to examination, by physicians designated by the Company acting within its rights as set forth above, upon its request.

No judicial proceeding shall be brought to enforce the endorsement of any employee's certificate under this provision unless brought within two years after the Company refuses to make such endorsement. If any time limitation of this Policy with respect to the bringing of any judicial proceeding to enforce endorsement of any employee's certificate under this provision is less than that permitted by the law of the state in which the insured resides at the time this Policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

If an individual policy shall have been issued and become effective in accordance with the provision entitled "Conversion Privilege," no payment shall be made under the terms of this provision unless such individual policy shall be surrendered to the Company without claim thereunder, in which case the Company will refund to the beneficiary under such individual policy the premium paid thereon.

Conversion Privilege

A. Any employee, upon written application made to the Company within thirty-one days after the earlier of the following dates:

Exhibit A—(Continued)

Section A—(Continued)

(a) the date of termination of his employment, as hereinbefore defined, for any reason whatsoever, or

(b) the date of discontinuance of individual insurance because of failure to make the required premium contribution, unless the employee continues active work as a full-time employee,
or within thirty-one days after

(c) the date of cessation if his rights under the provision entitled "Waiver of Premium Benefit in the Event of Permanent and Total Disability," shall be entitled to have issued to him by the Company, without evidence of insurability, an individual policy of life insurance subject to all the following conditions and provisions:

(1) such individual policy shall be in any one of the forms then customarily issued by the Company, except term insurance; [A-2]

(2) the premium for such individual policy shall be the premium applicable to the class of risk to which the employee belongs and to the form and amount of the policy at the employee's attained age (nearest birthday) at the date of issue of such individual policy;

(3) the amount of such individual policy shall be equal to (or at the option of the employee, less than) the amount of the employee's Life Insurance hereunder which was discon-

Exhibit A—(Continued)

Section A—(Continued)

tinued on whichever of the dates specified in paragraphs (a), (b) or (c) above is applicable;

(4) the first premium payment on such individual policy of life insurance so issued shall be made to the Company within the thirty-one-day period during which application for such individual policy may be made;

(5) that no other such individual policy issued to the employee in accordance with this provision is then in force.

B. Any employee, upon

(a) termination of this Policy by either the Union or the Company, or

(b) termination of that portion of this Policy providing Life Insurance, shall be entitled to the rights and benefits set forth in subdivision A of this provision, in accordance with its terms and conditions, provided his Life Insurance has been continuously in force for at least five years immediately preceding such termination, except that the amount of such individual policy shall not exceed the lesser of

(i) the amount of such employee's Life Insurance under this Policy at the date of such termination, less any amount of Life Insurance for which he may be or may become eligible under any Group

Exhibit A—(Continued)

Section A—(Continued)

Policy issued by the Company or by any other insurer within thirty-one days after such termination, and

(ii) \$2,000.

C. Insurance under any individual policy issued in accordance with this provision shall become effective at the end of the thirty-one-day period during which application for such individual policy may be made.

Extension of Death Benefit During Conversion Privilege Period. In the event of the death of the employee during such thirty-one-day period and if the employee is not otherwise entitled to Life Insurance benefits under this Policy, the Company shall pay to the beneficiary as a death benefit the maximum amount of Life Insurance for which an individual policy could have been issued under this provision whether or not the employee shall have made written application for conversion.

Beneficiary. The employee may from time to time change the beneficiary under his Life Insurance hereunder by filing written notice thereof at the Home Office of the Company. After such written notice has been received, the change shall relate back to take effect as of the date the employee signed said written notice of change whether or not the employee be living at the time of the receipt of such written notice but without prejudice to the

Exhibit A—(Continued)

Section A—(Continued)

Company on account of any payment made by it before receipt of such written notice. [A-3]

In the event of the death of the beneficiary or beneficiaries last named by the employee prior to that of the employee, or if no beneficiary shall have been named, the Life Insurance or the commuted value of any remaining instalments thereof payable as herein provided, as the case may be, shall be paid to the executors or administrators of the employee, except that the Company may in such case, at its option, pay such insurance to such employee's wife or husband if living; if not living, to the children of such employee, equally; if none survive, to either the father or mother of such employee or to both equally if both survive.

If the beneficiary is a minor or is otherwise incapable of giving a valid release for any payment due, the Company may, at its option and until claim is made by the duly appointed guardian or committee of such beneficiary, make payment of the amount of Life Insurance payable to such beneficiary, at a rate not exceeding \$50.00 per month, to any relative by blood or connection by marriage of such beneficiary, or to any other person or institution appearing to it to have assumed custody and principal support of such beneficiary. Such payments shall constitute a full discharge of the liability of the Company to the extent thereof.

Modes of Settlement of Claims. Any valid claim

Exhibit A—(Continued)

Section A—(Continued)

under this Policy shall be paid either in one amount, or upon the written election of the employee, in a fixed number of instalments which may be mutually agreed upon in writing by the employee and the Company and which will provide for payment of the full amount of Life Insurance due during the period not exceeding five years after the death of the employee. Such instalment payments shall be computed upon the basis of the effective rate of interest applicable under this provision at the date of death of the insured employee.

In the event that an agreement for payment of claim by instalments has not been made by the employee prior to his death, such an agreement may be made by the beneficiary last named by the employee.

If the beneficiary shall die before all instalments have been paid under such an agreement selected, and if there is no contingent beneficiary designated, the remainder of the instalments shall be commuted and paid in one sum to the executors or administrators of the beneficiary. The effective date of interest used by the Company in commuting any remaining instalments shall be the rate of interest originally used in determining such instalment payments.

The Company shall determine each year the effective rate of interest to be guaranteed as the basis for computing instalment payments under any

Exhibit A—(Continued)

Section A—(Continued)

claim with respect to which the date of death of the insured employee occurs in the calendar year following such determination.

Misstatement of Age. If the age of any employee has been misstated, the amount payable hereunder shall be the full amount of Life Insurance to which said employee is entitled in accordance with the provision entitled "Amounts of Insurance" contained herein, but premium adjustments shall be made and the Union shall pay the Company the premiums called for at the true age of the employee.

Incontestability. Except for non-payment of premiums by the Union, this Policy shall be incontestable after two years from the date of issue and the Life Insurance on an individual employee shall be incontestable after such insurance has been in force for a period of two years during such employee's lifetime.

Assignment. No rights or benefits of any employee relating to Life Insurance under this Policy shall be assignable. [A-4]

Section B

Group Accidental Death and Dismemberment Insurance

Insuring Clause. If any employee, while insured for Accidental Death and Dismemberment Insurance under this Policy, suffers any of the losses described below, as a result of bodily injuries sustained solely through external, violent and acci-

Exhibit A—(Continued)

Section B—(Continued)

dental means, directly and independently of all other causes and within ninety days from the date of such injuries, the Company shall pay to the employee, if living, otherwise to a beneficiary other than any Employer, the amount of insurance specified for such loss in the following Schedule of Indemnities, determined on the basis of the Full Amount of Insurance set forth in the provision entitled "Amounts of Insurance" contained herein; provided, however, that no payment shall be made for any loss caused wholly or partly, directly or indirectly, by

(a) disease, or bodily or mental infirmity, or medical or surgical treatment thereof; or

(b) ptomaines, or bacterial infections, except infection introduced through a visible wound accidentally sustained; or

(c) suicide while sane or insane, or intentionally self-inflicted injury; or

(d) war, or any act of war, whether declared or undeclared.

Schedule of Indemnities

Full Amount of Insurance for Loss of:

Life

Both Hands

Both Feet

One Hand and One Foot

Sight of Both Eyes

One Hand and Sight of One Eye

One Foot and Sight of One Eye

Exhibit A—(Continued)

Section B—(Continued)

One-Half of the Full Amount of Insurance for
Loss of:

Sight of One Eye

One Hand

One Foot

Loss of hands or feet shall mean loss by severance at or above the wrist or ankle joint, and loss of sight shall mean total and irrecoverable loss of sight.

If an employee shall suffer more than one of the losses described above as a result of any one accident, no more than the full amount of insurance of the employee shall be payable.

Beneficiary. The employee may from time to time change the beneficiary under his Accidental Death and Dismemberment Insurance hereunder by filing written notice thereof at the Home Office of the Company. After such written notice has been received, the change shall relate back to take effect as of the date the employee signed said written notice of change whether or not the employee be living at the time of the receipt of such written notice, but without prejudice to the Company on account of any payment made by it before receipt of such written notice.

In the event of the death of the beneficiary or beneficiaries last named by an employee prior to that of the employee, or if no beneficiary shall have

Exhibit A—(Continued)

Section B—(Continued)

been named, the indemnity for loss of life provided by the Accidental Death and Dismemberment Insurance under this Policy shall be paid to the executors or administrators of the employee, except that the Company may in such case, at its option, pay such insurance to the employee's wife or husband if living; if not living, to the children of such employee, equally; if none survive, to either the father or the mother of the employee or to both equally if both survive.

Assignment. No rights or benefits of any employee relating to Accidental Death and Dismemberment Insurance under this Policy shall be assignable. [B-1]

Section C

Group Accident and Sickness Insurance
Nonoccupational I

(Applicable Only to Employees Whose Employment
Is Not Subject to the CUI Act)

Insuring Clause. If any employee, while insured for Accident and Sickness Insurance under this Policy, becomes wholly and continuously disabled by

(1) an accidental bodily injury which does not arise out of and in the course of any employment for wage or profit, or

(2) disease for which the employee is not entitled to a benefit under any Workman's Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act, and

Exhibit A—(Continued)

Section C—(Continued)

is prevented from performing any and every duty of his occupation, the nonoccupational weekly benefit to which he is entitled as determined in accordance with the provision entitled "Amounts of Insurance" contained herein shall be payable to the employee while so disabled for that part of any one period of disability whether from one or more causes, which does not exceed twenty-six weeks (less any weeks immediately prior to or during such disability for which the employee was or is entitled to benefits under any unemployment compensation law or act), but no benefit shall be payable for the first three days of any such disability due to disease.

Occupational

(Applicable to All Employees)

Insuring Clause. If any employee while insured for Accident and Sickness Insurance under this Policy becomes wholly and continuously disabled by

(1) an accidental bodily injury which arises out of and in the course of any employment for wage or profit, or

(2) disease for which the employee is entitled to a benefit under any Workmen's Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act, and is prevented from performing any and every duty of his occupation, the occupational weekly benefit

Exhibit A—(Continued)

Section C—(Continued)

to which he is entitled as determined in accordance with the provision entitled "Amounts of Insurance" contained herein shall be payable to the employee while so disabled for that part of any one period of disability whether from one or more causes, which does not exceed twenty-six weeks (less any weeks immediately prior to or during such disability for which the employee was or is entitled to benefits under any unemployment compensation law or act), but no benefit shall be payable for the first three days of any such disability due to disease.

Limitations under Nonoccupational I and Occupational. No benefit shall be payable

(a) for any period of disability during which the employee is not under treatment by a legally qualified physician, or

(b) for any period of disability caused by or resulting from pregnancy which term includes resulting childbirth or miscarriage, or

(c) for any period of disability for which the employee is entitled to benefits under any unemployment compensation law or act.

Successive periods of disability separated by less than two weeks of active work on full time shall be considered one period of disability unless the subsequent disability is due to an injury or disease entirely unrelated to the causes of the previous disability and commences after the employee has returned to active work on full time. [C-1]

Exhibit A—(Continued)

Section C—(Continued)

Nonoccupational II

(Applicable Only to Employees whose Employment is Subject to the CUI Act and who are not insured for UCD Benefits under the Rider attached to this Policy)

Insuring Clause. Upon receipt of due proof by the Company, that any employee, while insured for Accident and Sickness Insurance under this Policy, has become disabled as a result of mental or physical illness or injury and is thereby prevented from performing his regular and customary work, the nonoccupational weekly benefit to which he is entitled as determined in accordance with the provision entitled "Amounts of Insurance" contained herein shall be payable to the employee while so disabled for that part of any one period of continuous disability whether from one or more causes, which does not exceed twenty-six weeks (less any weeks immediately prior to or during such disability for which the employee was or is entitled to unemployment benefits under any unemployment compensation law or act), but no benefit shall be payable for the first three days of any such disability due to disease; except that if the employee, within such three days, becomes confined as a registered bed patient in a hospital and thereby entitled to additional benefits during hospital confinement by virtue of Section 209 of the CUI Act, the benefit shall be payable commencing with the first day of such confinement.

Exhibit A—(Continued)

Section C—(Continued)

Limitations Under Nonoccupational II. No benefits shall be payable

(a) For any period for which the employee is entitled to receive benefits under any Workmen's Compensation or Employer's Liability Law or Act;

(b) for any period of disability for which the employee is entitled to receive unemployment benefits under any state or federal unemployment compensation law or act;

(c) for any disability which is not certified by a physician or surgeon, or by a dentist, chiropodist, osteopath, chiropractor or optometrist each acting within the scope of his practice, or by an authorized medical officer of any medical facility of the United States Government or by a religious practitioner accredited by a bona fide church, sect, denomination or organization;

(d) for disability caused by or arising in connection with a pregnancy unless such disability is compensable under the disability provision of the CUI Act.

Two consecutive periods of disability due to the same or related cause or condition and separated by a period of not more than fourteen days shall be considered as one continuous period of disability.

Assignment. No rights or benefits of any em-

Exhibit A—(Continued)

Section C—(Continued)

ployee relating to Accident and Sickness Insurance under this Policy shall be assignable. [C-2]

Section D

Group Hospital Expense Insurance for Employees

Benefits in the Event of Hospitalization Resulting from Accidental Bodily Injury or Disease. If any employee, while insured for Hospital Expense Insurance under this Policy, is confined as herein-after provided in a legally constituted hospital, other than at federal government expense or in a facility owned or operated by the United States Government, as a result of

(1) an accidental bodily injury which does not arise out of and in the course of employment, or

(2) disease for which the employee is not entitled to a benefit under any Workmen's Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act.

the following benefits are payable to an employee whose employment is not subject to the California Unemployment Insurance Act:

(a) a Benefit is an amount equal to the charges incurred during such confinement for board and room of the employee but not more than the amount obtained by multiplying the rate of Maximum Daily Benefit which is applicable to the employee in accordance with the provision entitled "Amounts of Insurance" con-

Exhibit A—(Continued)

Section D—(Continued)

tained herein by the number of days the employee is confined in the hospital; but in no event shall the total amount payable for all such charges incurred during any one continuous period of disability exceed a sum equal to one hundred and eighty times said rate of Maximum Daily Benefit; and

(b) a Benefit in an amount equal to the charges, except board and room charges; made by the hospital to the employee in connection with such confinement, together with any charge made by a physician for anaesthetics and the administration thereof; but in no event shall the total amount payable for all such charges incurred during any one continuous period of disability exceed a sum equal to twenty times said rate of Maximum Daily Benefit;

and the following benefits are payable to an employee whose employment is subject to the California Unemployment Insurance Act:

(c) a Benefit in an amount equal to the charges incurred during such confinement for board and room of the employee but not more than a maximum amount obtained by multiplying

(i) the rate of Maximum Daily Benefit which is applicable to the employee in accordance with the provision entitled "Amounts of Insurance" contained herein, by

Exhibit A—(Continued)

Section D—(Continued)

(ii) the number of days, not to exceed one hundred and eighty, during any one continuous period of disability, that the employee is confined in the hospital, provided, however, that if the employee is entitled to additional benefits during hospital confinement by virtue of Section 209 of the California Unemployment Insurance Act, the maximum benefit payable to such employee under this subdivision shall be the amount, if any, by which the benefit determined in accordance with (i) and (ii) above exceeds the amount determined by multiplying \$8.00 by the number of days of such period of confinement for which the employee is entitled to such additional benefit by virtue of said Section; and

(d) a Benefit in an amount equal to the charges, except board and room charges, made by the hospital to the employee in connection with such confinement, together with any charge made by a physician for anaesthetics and the administration thereof; but in no event shall the total amount payable for all such charges incurred during any one continuous period of disability exceed a sum equal to twenty times said rate of Maximum Daily Benefit.

The number of days that the employee is confined

Exhibit A—(Continued)

Section D—(Continued)

in the hospital shall be construed to be only the number of days for which the hospital charges for board and room.

If the employee is wholly disabled on the date his Hospital Expense Insurance for Employees under this Policy ceases and is confined as provided herein as a result of an accidental bodily injury or disease above described within three months after such date and during the continuance of such disability, the benefits shall be payable to the employee which would have been payable if such confinement had commenced while the employee was [D-1] insured.

Maternity Benefit. If any employee is confined as hereinafter provided in a legally constituted hospital as a result of pregnancy, which term includes resulting childbirth or miscarriage, while insured, or after the date the employee's Hospital Expense Insurance ceased if the pregnancy existed on the date the employee's Hospital Expense Insurance ceased, a Benefit is payable to the employee in an amount equal to the charges (except charges for nurse's room and board) made by the hospital to the employee in connection with such confinement, together with any charge made by a physician for anaesthetics and the administration thereof, but in no event shall the total amount payable for all such charges resulting from any one pregnancy exceed a sum equal to ten times the employee's rate of

Exhibit A—(Continued)

Section D—(Continued)

Maximum Daily Benefit determined in accordance with the provision entitled “Amounts of Insurance” contained herein; provided, however,

(1) if the Obstetrical Benefit described in the Section of this Policy entitled “Group Surgical Operation Expense Insurance for Employees” is also payable in connection with such pregnancy, the Maternity Benefit described herein together with said Obstetrical Benefit shall not exceed the Maximum Combined Hospital Maternity and Obstetrical Benefit shown in the provision entitled “Amounts of Insurance” contained herein; and

(2) that no benefits are payable to an employee whose pregnancy exists on the effective date of the employee’s insurance if such effective date is subsequent to July 31, 1950; except that, with respect to employees of an Employer to whom the Employees Hospital and Allied Lines Insurance would have been available on July 1, 1950, but for the inability of the Union and the Employer and the Company to arrange for enrollment of said employees prior to July 31, 1950, and whose Employer made a deduction for the cost of any other hospital expense plan from July 1, 1950, to the date such enrollment commences, no benefits are payable to such an employee whose pregnancy exists on the effective date of the employee’s

Exhibit A—(Continued)

Section D—(Continued)

insurance if such effective date is more than thirty-one days after the date such enrollment commences.

Period of Confinement. No minimum of hospital confinement is required because of a surgical operation, or as a result of accidental bodily injury requiring emergency care, or if a board and room charge is made; otherwise, hospital confinement must be for eighteen consecutive hours or longer.

Limitations. No payment shall be made for any charges incurred for board and room, or for any charges made for services, in connection with hospital confinement unless such confinement and services for which charges are made are recommended and approved by a legally qualified physician or surgeon.

Successive periods of hospital confinement due to the same or related accidental bodily injury or disease shall be considered as having occurred during one continuous period of disability unless complete recovery from such accidental bodily injuries or diseases which caused a previous period of hospital confinement has taken place before a subsequent period of hospital confinement commences, or unless the employee has returned to active work and has completed one day of active service before a subsequent period of hospital confinement [D-2] commences.

Exhibit A—(Continued)

Section E

Group Surgical Operation Expense Insurance
for Employees

Benefit for an Operation Resulting from Accidental Bodily Injury or Disease. If any employee, while insured for Surgical Operation Expense Insurance under this Policy, undergoes a surgical operation specified in the Schedule of Surgical operations and Benefits contained in this Section as a result of

(1) an accidental bodily injury which does not arise out of and in the course of employment, or

(2) disease for which the employee is not entitled to a benefit under any Workmen's Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act,

a benefit is payable to the employee in an amount equal to the surgical fees actually charged to the employee for the operation, but not in excess of the maximum payment specified for the operation in the applicable Schedule of Surgical Operations and Benefits.

If more than one of the above described operations is performed while the employee is insured hereunder, the aforesaid benefit shall be payable for each such operation, except that the total benefit payable for all operations which are not entirely unrelated to the bodily injuries sustained in any

Exhibit A—(Continued)

Section E—(Continued)

one accident or to the same disease and which are performed before the employee either completely recovers from such injuries or disease or returns to active work and completes one day of active service, shall not exceed the Maximum Surgical Benefit applicable to the employee provided, however, that if more than one operation is performed

(a) through the same abdominal incision, the total benefit payable for all such operations shall not exceed the maximum payment specified in said Schedule for that one of such operations for which the largest amount is payable; or

(b) on the anus or rectum, or both (except for cancer), at any one time, the total benefit payable for all such operations shall not exceed one and one-half times the maximum payment specified in said Schedule for that one of such operations for which the largest amount is payable.

If any employee is wholly disabled by an injury or disease as hereinbefore described on the date his Surgical Operation Expense Insurance for Employees under this Policy ceases and undergoes a surgical operation specified in said Schedule within three months after such date and during the continuance of such disability, a benefit which would have been payable if his insurance had not ceased shall be payable to the employee. [E-1]

Exhibit A—(Continued)

Section E—(Continued)

Obstetrical Benefit. If any female employee undergoes a surgical operation specified in the Schedule of Surgical Operations and Benefits under the heading "Obstetrical Procedures," while insured, or after the date her Surgical Operation Expense Insurance ceased if pregnancy existed on the date her Surgical Operation Expense Insurance ceased, the aforesaid benefit is payable to the employee; provided, however,

(1) if the Maternity Benefit described in the Section of this Policy entitled "Group Hospital Expense Insurance for Employees" is also payable in connection with such surgical operation, the Obstetrical Benefit described herein together with said Maternity Benefit shall not exceed the Maximum Combined Hospital Maternity and Obstetrical Benefit shown in the provision entitled "Amounts of Insurance" contained herein; and

(2) that no benefits are payable to an employee whose pregnancy exists on the effective date of the employee's insurance if such effective date is subsequent to July 31, 1950; except that with respect to employees of an Employer to whom the Employees Hospital and Allied Lines Insurance would have been available on July 1, 1950, but for the inability of the Union and the Employer and the Company to arrange for enrollment of said employees prior to July

Exhibit A—(Continued)

Section E—(Continued)

31, 1950, and whose Employer made a deduction for the cost of any other hospital expense plan from July 1, 1950, to the date such enrollment commences, no benefits are payable to such an employee whose pregnancy exists on the effective date of the employee's insurance if such effective date is more than thirty-one days after the date such enrollment commences.

Limitations. No payment shall be made for any operation

(a) not recommended, approved, and performed by a legally qualified physician or surgeon; or

(b) performed in a facility owned or operated by the United States Government, or elsewhere at federal government expense. [E-2]

Schedule of Surgical Operations and Benefits

(Applicable only to employees whose Maximum Surgical Benefit determined in accordance with the Schedule of Insurance is \$300.00)

Description of Operation	Maximum Payment
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Abdomen

Appendectomy, freeing of adhesions or surgical exploration of the abdominal cavity	\$150.00
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Removal of, or other operation on gall bladder	225.00
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Exhibit A—(Continued)

Section E—(Continued)

Description of Operation	Maximum Payment
Gastro-enterostomy	225.00
Resection of stomach, bowel or rectum..	300.00
Abscesses (See Tumors)	
Amputations	
Thigh, leg	187.50
Upper arm, forearm, entire hand or foot	150.00
Fingers or toes, each.....	22.50
Breast	
Removal of benign tumor or cyst requiring hospital confinement.....	75.00
Simple amputation	150.00
Radical amputation	225.00
Chest	
Complete thoracoplasty, transthoracic approach to stomach, diaphragm, or esophagus; sympathectomy or laryngectomy	300.00
Removal of lung or portion of lung....	300.00
Bronchoscopy, esophagoscopy	60.00
Induction of artificial pneumothorax, initial	37.50
Refills each (not more than 12).....	15.00
Dislocation, Reduction of	
Hip, ankle joint, elbow or knee joint (patella excepted)	52.50
Shoulder	37.50

Exhibit A—(Continued)

Section E—(Continued)

Description of Operation	Maximum Payment
Collar bone	30.00
Lower jaw, wrist or patella.....	22.50
For a dislocation requiring an open operation, the maximum will be twice the amount shown above.	
Excision or Fixation by Cutting	
Hip joint	225.00
Knee or elbow joint.....	187.50
Shoulder, semilunar cartilage, wrist or ankle joint	150.00
Removal of diseased portion of bone, including curettage (alveolar processes excepted)	75.00
Ear, Nose or Throat	
Fenestration, one or both ears.....	300.00
Mastoidectomy, one or both sides, simple radical	225.00
Tonsillectomy, adenoidectomy, or both..	50.00
Sinus operation by cutting (puncture of antrum excepted)	75.00
Submucous resection of nasal septum...	75.00
Tracheotomy	112.50
Any other cutting operation.....	22.50
Eye	
Operation for detached retina or corneal transplant	300.00

Exhibit A—(Continued)

Section E—(Continued)

Description of Operation	Maximum Payment
Cataract, removal of.....	225.00
Any other cutting operation into the eyeball (through the cornea or sclera) or cutting operation on eye muscles..	150.00
Removal of eyeball.....	112.50
Any other cutting operation on eyeball.	30.00
Fracture, Treatment of	
Thigh, vertebra or vertebrae, pelvis (coccyx excepted)	112.50
Leg, kneecap, upper arm, ankle (Potts)	75.00
Lower jaw (alveolar process excepted), collar bone, shoulder blade, forearm, wrist (Colles), skull	37.50
Hand, foot	22.50
Fingers or toes, each.....	15.00
Nose	15.00
Rib or ribs, three or more.....	37.50
fewer than three.....	15.00

The amounts shown above are for simple fractures.

For a compound fracture, the maximum will be one and one-half times the amount for the corresponding simple fracture.

For a fracture requiring an open operation, the maximum will be twice the amount for the corresponding simple fracture (bone

Exhibit A—(Continued)

Section E—(Continued)

Description of Operation	Maximum Payment
grafting or bone splicing or metallic fixation at point of fracture considered as open operation).	
Genito-Urinary Tract	
Removal of, or cutting into, kidney....	\$300.00
Fixation of kidney.....	225.00
Removal of tumors or stones in ureter or bladder	
By cutting operation.....	150.00
By endoscopic means.....	52.50
Cystoscopy	37.50
Removal of prostate by open operation.	225.00
Removal of prostate by endoscopic means	150.00
Circumcision	22.50
Varicocele, hydrocele, orchidectomy or epididymectomy, single	75.00
bilateral	112.50
Hysterectomy	225.00
Other cutting operations on uterus and its appendages with abdominal approach	150.00
Cervix amputation	75.00
Dilatation and curettage (non-puerperal), cervix cauterization or conization, polypectomy, or any combination of these	37.50

Exhibit A—(Continued)

Section E—(Continued)

Description of Operation	Maximum Payment
Vaginal plastic operation for, cystocele or rectocele	112.50
Cystocele and rectocele.....	150.00
Goitre	
Removal of thyroid, subtotal.....	225.00
Removal of adenoma or benign tumor of thyroid	150.00
Hernia	
Single hernia	150.00
More than one hernia.....	187.50
Joint	
Incision into, tapping excepted.....	37.50
Ligaments and Tendons	
Cutting or transplant, single.....	75.00
multiple	112.50
Suturing of tendon, single.....	52.50
multiple	75.00
Paracentesis	
Tapping	22.50
Pilonidal Cyst or Sinus	
Removal of	75.00
Rectum	
Hemorrhoidectomy, external	37.50
Internal, or internal and external....	75.00

Exhibit A—(Continued)

Section E—(Continued)

Description of Operation	Maximum Payment
Cutting operation for fissure.....	37.50
Cutting operation for thrombosed hem- orroids	22.50
Cutting operation for fistula in anus, single	75.00
multiple	112.50
Skull	
Cutting into cranial cavity (trephine excepted)	300.00
Trephine	37.50
Spine or Spinal Cord	
Operation for spinal cord tumor.....	300.00
Operation with removal of portion of Vertebra or veretbrae (except coccyx, transverse or spinous process).....	225.00
Removal of part or all of coccyx, or of transverse or spinous process.....	75.00
Tumors	
Cutting operation for removal of one or more benign or superficial tumors, cysts or abscesses:	
Requiring hospital confinement....	37.50
Not requiring hospital confinement.	15.00
Malignant tumors of face, lip or skin...	75.00
Varicose Veins	
Injection treatment, complete procedure, one or both legs.....	60.00
Cutting operation, complete procedure, one leg	75.00
Both legs	112.50

Exhibit A—(Continued)

Section E—(Continued)

Description of Operation	Maximum Payment
Obstetrical Procedures	
Delivery of child or children.....	100.00
Caesarean section	100.00
Abdominal operation for extra-uterine pregnancy	150.00
Miscarriage	37.50

Except for operations expressly excepted in the Schedule, the Company shall, subject to the terms and conditions of this Policy, determine a payment for any cutting operation not listed in the Schedule consistent with the payment for any listed operation of comparable difficulty and complexity, but in no event shall such payment exceed the applicable Maximum Surgical Benefit. [E-4]

Section F

Group Medical Expense Insurance for Employees

Medical Expense Benefits. If any employee receives medical treatment by a physician legally qualified to practice medicine, as a result of

(1) an accidental bodily injury which does not arise out of and in the course of employment, or

(2) disease for which the employee is not entitled to a benefit under any Workmen's

Exhibit A—(Continued)

Section F—(Continued)

Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act.

a benefit is payable to the employee in an amount equal to the fees charged by the physician for each such treatment if received while the employee is insured, but not in excess of the applicable maximum payment per treatment specified in the provision entitled "Amounts of Insurance" contained herein; provided that no benefit shall be payable

(a) in excess of the Maximum Medical Benefit specified in said provision for all treatments received by the employee in connection with any one accident or any one disease (the phrase "any one disease" shall include a recurrence of the disease unless complete recovery has intervened); or

(b) for more than one treatment on any day; or

(c) for any treatment caused by or resulting from pregnancy, which term includes resulting childbirth or miscarriage; or

(d) for dental work or treatment, or for eye examinations or the fitting of glasses, or for X-rays, drugs, dressings or medicine; or

(e) for any treatment received in connection with and on or after the date of an operation or procedure for which a benefit is payable under the Section of this Policy providing Sur-

Exhibit A—(Continued)

gical Operation Expense Insurance for Employees; or

(f) for any medical treatment for which a benefit is provided under the Sections of this Policy entitled "Group Hospital Expense Insurance for Employees" and "Group Laboratory and X-ray Examination Expense Insurance"; or

(g) for any treatment received in a facility owned or operated by the United States Government, or elsewhere at federal government expense.

If any employee is wholly disabled as a result of an injury or disease as hereinbefore described on the date his Medical Expense Insurance for Employees under this Policy ceases and is thereby prevented from performing any and every duty of his occupation and receives medical treatment by a physician legally qualified to practice medicine within three months after the date his insurance ceased and during the continuance of such disability, the benefit hereinbefore described shall be payable to the employee for such treatment, provided such benefit would have been payable if the employee's insurance had not ceased. [F-1]

Section G

Group Laboratory and X-Ray Examination
Expense Insurance for Employees

Laboratory and X-ray Examination Expense Benefits. If any employee receives a laboratory ex-

Exhibit A—(Continued)

Section G—(Continued)

amination or an X-ray examination specified in the Schedule of Laboratory and X-ray Examinations and Benefits contained herein and if such examination is made or recommended by a physician legally qualified to practice medicine in connection with a diagnosis of

(1) an accidental bodily injury which does not arise out of and in the course of employment, or

(2) a disease for which the employee is not entitled to a benefit under any Workmen's Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act,

a benefit is payable to the employee in an amount equal to the fees actually charged to the employee for each such examination if received while the employee is insured, but not in excess of the maximum payment specified for such examination in said Schedule, except that if two or more of the examinations are received by an employee in connection with any one accident or any one disease (the phrase "any one disease" shall include a recurrence of the disease unless complete recovery has intervened), the total amount payable shall not exceed the Maximum Laboratory and X-ray Examination Expense Benefit specified in the provision entitled "Amounts of Insurance" contained herein; provided that no payment shall be made for

Exhibit A—(Continued)

Section G—(Continued)

(a) any examination received by an employee while confined in a hospital of the employee is entitled to any hospital expense benefits under the Section of this Policy providing Hospital Expense Insurance for Employees during such confinement; or

(b) any examination due to or resulting from pregnancy, which term includes resulting childbirth or miscarriage; or

(c) any dental X-ray examination unless it is the result of an accidental bodily injury which does not arise out of and in the course of employment; or

(d) any examination received from or in facilities owned or operated by the United States Government or elsewhere at federal government expense.

If any employee is wholly disabled as a result of an injury or disease hereinbefore described on the date his Laboratory and X-ray Examination Expense Insurance for Employees under this Policy ceases and is thereby prevented from performing any and every duty of his occupation and receives an examination hereinbefore described, made or recommended by a physician legally qualified to practice medicine within three months after the date his insurance ceased and during the continuance of such disability, the benefit hereinbefore described shall be payable to the employee for such examina-

Exhibit A—(Continued)

Section G—(Continued)

tion, provided such benefit would have been payable if the employee's insurance had not ceased. [G-1]

Description of	Maximum
X-ray Examination	Payment
Abdomen or organs therein (unless otherwise specified in the Schedule.....	\$10.00
Arm or leg.....	5.00
Chest (heart and lungs).....	10.00
Gall bladder, kidney, ureter, or bladder—dye method.....	15.00
Gastrointestinal series—barium meal.....	25.00
Head (skull or sinuses).....	10.00
Joints (shoulder, knee, elbow, ankle, wrist, hands, or feet).....	5.00
Pelvis	10.00

Description of	Maximum
Laboratory Examination	Payment
Basal Metabolism Test.....	\$ 5.00
Electrocardiogram	7.50
Hinton, Kahn, or Kline Test (one or more types at one time to be considered one ex- amination	3.00
Malaria smear.....	2.00
Sputum Test.....	2.00
Sugar determinations, blood and urine (one of each).....	5.00
Sugar Tolerance (three or more blood and urine determinations).....	10.00
Wassermann Test.....	5.00

Exhibit A—(Continued)

Section G—(Continued)

The Company shall determine a consistent payment for any laboratory or X-ray examination not covered in this Schedule unless payment for the examination is expressly excepted by the other terms of this Section of the Policy; provided, however, that such payment may be less than the smallest maximum payment listed but such payment shall in no event exceed the largest maximum payment listed. [G-2]

Section H

Group Supplemental Accident Expense
Insurance for Employees

Accident Benefit. If any employee, while insured for Supplemental Accident Expense Insurance for Employees under this Policy, suffers an accidental bodily injury which does not arise out of and in the course of employment and, within seven months of the date of the accident, incurs on account of such injury expense because of

(a) charges of a legally qualified physician or surgeon for medical or surgical treatment, or

(b) charges by a legally constituted hospital for confinement therein, or

(c) charges for laboratory or X-ray examinations, or

(d) charges for the services of a registered nurse,

which treatment, confinement, examination or serv-

Exhibit A—(Continued)

ices are received upon the recommendation and approval of and while under the regular care and treatment of a physician or surgeon legally qualified to practice medicine, a benefit is payable to the employee in an amount, not to exceed the Maximum Supplemental Accident Expense Benefit specified in the provision entitled "Amounts of Insurance" contained herein for any one accident, equal to that part of such charges which is in excess of the amount payable under this Policy to the employee for all other benefits for such expense; provided, however, that no benefit shall be payable for any such care and services received in facilities owned or operated by the United States Government or elsewhere at federal government expense. [H-1]

Section M**Group Hospital Expense Insurance for Dependents**

Benefits in the Event of Hospitalization Resulting from Accidental Bodily Injury or Disease. If any dependent of an employee, while insured for Hospital Expense Insurance under this Policy, is confined as hereinafter provided in a legally constituted hospital as a result of

(1) an accidental bodily injury which does not arise out of and in the course of employment, or

(2) disease for which the dependent is not entitled to a benefit under any Workmen's

Exhibit A—(Continued)

Section M—(Continued)

Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act, the following benefits are payable to the employee:

(a) a Benefit in an amount equal to the charges incurred during such confinement for board and room of the dependent but not more than the amount obtained by multiplying the rate of Maximum Daily Benefit which is applicable to the dependent in accordance with the provision entitled "Amounts of Insurance" contained herein by the number of days the dependent is confined in the hospital; but in no event shall the total amount payable for all such charges incurred during any one continuous period of disability exceed a sum equal to one hundred and eighty times said rate of Maximum Daily Benefit; and

(b) a Benefit in an amount equal to the charges, except board and room charges, made by the hospital to the employee in connection with such confinement, together with any charge made by a physician for anaesthetics and the administration thereof; but in no event shall the total amount payable for all such charges incurred during any one continuous period of disability exceed a sum equal to twenty times said rate of Maximum Daily Benefit.

The number of days that a dependent is confined

Exhibit A—(Continued)

Section M—(Continued)

in the hospital shall be construed to be only the number of days for which the hospital charges for board and room.

If any dependent of an employee is wholly disabled on the date the dependent's Hospital Expense Insurance under this Policy ceases and is confined as provided herein as a result of an accidental bodily injury or disease above described within three months after such date and during the continuance of such disability, the benefits shall be payable to the employee which would have been payable if such confinement had commenced while the dependent was insured. [M-1]

Maternity Benefit. If the wife, while a dependent of an employee, is confined as hereinafter provided in a legally constituted hospital as a result of pregnancy, which term includes resulting childbirth or miscarriage, while insured, or after the date her Hospital Expense Insurance ceased if the pregnancy existed on the date such insurance ceased, a benefit is payable to the employee in an amount equal to the charges (except charges for nurse's board and room) made by the hospital to the employee in connection with such confinement, together with any charge made by a physician for anaesthetics and the administration thereof, but in no event shall the total amount payable for all such charges resulting from any one pregnancy exceed a sum equal to ten times the rate of Maximum Daily Benefit applicable

Exhibit A—(Continued)

Section M—(Continued)

to such dependent in accordance with the provision entitled “Amounts of Insurance” contained herein; provided, however,

(1) if the Obstetrical Benefit described in the section of this Policy entitled “Group Surgical Operation Expense Insurance for Dependents” is also payable in connection with such pregnancy, the Maternity Benefit described herein together with said Obstetrical Benefit shall not exceed the Maximum Combined Hospital Maternity and Obstetrical Benefit shown in the provision entitled “Amounts of Insurance” contained herein; and

(2) that no benefit is payable if pregnancy exists on the effective date of her insurance if such effective date is subsequent to July 31, 1950; except that, with respect to the dependents of employees of an Employer to whom the Dependents Hospital and Allied Lines Insurance would have been available on July 1, 1950, but for the inability of the Union and the Employer and the Company to arrange for enrollment of said employees prior to July 31, 1950, no benefit is payable if pregnancy exists on the effective date of her insurance if such effective date is more than thirty-one days after the date such enrollment commences.

Period of Confinement. No minimum period of hospital confinement is required because of a surgi-

Exhibit A—(Continued)

Section M—(Continued)

cal operation, or as a result of accidental bodily injury requiring emergency care, or if a board and room charge is made; otherwise hospital confinement must be for eighteen consecutive hours or longer.

Limitations. No payment shall be made for any charges incurred for board and room, or for any charges made for services, in connection with hospital confinement

(a) unless such confinement and services for which charges are made are recommended and approved by a legally qualified physician or surgeon; or

(b) unless the age and status of the dependent on the date such confinement commences is within the age limits and classes set forth in the definition of dependents contained herein; or

(c) unless such confinement commences after the dependent becomes insured for Hospital Expense Insurance for Dependents under this Policy.

Successive periods of hospital confinement due to the same or related bodily injury or disease shall be considered as having occurred during one continuous period of disability unless complete recovery from the accidental bodily injuries or diseases which caused a previous period of hospital confinement has taken place before a subsequent period of hospital confinement commences. [M-2]

Section N

Group Surgical Operation Expense Insurance
for Dependents

Benefit for an Operation Resulting from Accidental Bodily Injury or Disease. If any dependent of an employee, while insured for Surgical Operation Expense Insurance under this Policy, undergoes a surgical operation specified in the Schedule of Surgical Operations and Benefits contained in this Section, as a result of

(1) an accidental bodily injury which does not arise out of and in the course of employment, or

(2) disease for which the dependent is not entitled to a benefit under any Workmen's Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act,

a benefit is payable to the employee in an amount equal to the surgical fees actually charged for the operation, but not in excess of the maximum payment specified for the operation in the applicable Schedule of Surgical Operations and Benefits.

If more than one of the above-described operations is performed while the dependent is insured hereunder, the aforesaid benefit shall be payable for each such operation, except that the total benefit payable for all operations which are not entirely unrelated to the bodily injuries sustained in any one accident or to the same disease and which are performed before the dependent completely recovers

Exhibit A—(Continued)

Section N—(Continued)

from such injuries or disease shall not exceed the Maximum Surgical Benefit applicable to the dependent; provided, however, that if more than one operation is performed

(a) through the same abdominal incision, the total benefit payable for all such operations shall not exceed the maximum payment specified in said Schedule for that one of such operations for which the largest amount is payable; or

(b) on the anus or rectum, or both, (except for cancer) at any one time, the total benefit payable for all such operations shall not exceed one and one-half times the maximum payment specified in said Schedule for that one of such operations for which the largest amount is payable.

If any dependent is wholly disabled by an injury or disease as hereinbefore described on the date the dependent's Surgical Operation Expense Insurance under this Policy ceases and undergoes a surgical operation specified in said Schedule within three months after such date and during the continuance of such disability, a benefit which would have been payable if his insurance had not ceased shall be payable to the employee. [N-1]

Obstetrical Benefit. If the wife, while a dependent of an employee, undergoes a surgical operation specified in the Schedule of Surgical Operations and

Exhibit A—(Continued)

Section N—(Continued)

Benefits contained herein under the heading “Obstetrical Procedures,” while insured, or after the date her Dependents Surgical Operation Expense Insurance ceased if pregnancy existed on the date such insurance ceased, the aforesaid benefit is payable to the employee; provided, however,

(1) if the Maternity Benefit described in the section of this Policy entitled “Group Hospital Expense Insurance for Dependents” is also payable in connection with such surgical operation, because of such surgical operation, the Obstetrical Benefit described herein together with said Maternity Benefit shall not exceed the Maximum Combined Hospital, Maternity and Obstetrical Benefit shown in the provision entitled “Amounts of Insurance” contained herein; and

(2) that no benefit is payable if pregnancy exists on the effective date of her insurance if such effective date is subsequent to July 31, 1950; except that, with respect to the dependents of employees of an Employer to whom the Dependents Hospital and Allied Lines Insurance would have been available on July 1, 1950, but for the inability of the Union and the Employer and the Company to arrange for enrollment of said employees prior to July 31, 1950, no benefit is payable if pregnancy exists on the effective date of her insurance if such effective

Exhibit A—(Continued)

Section N—(Continued)

date is more than thirty-one days after the date such enrollment commences.

Limitations. No payment shall be made for any operation

(a) not recommended, approved, and performed by a legally qualified physician or surgeon; or

(b) unless the age and status of the dependent on the date the operation is performed is within the age limits and classes set forth in the definition of dependents contained [N-2] herein.

Schedule of Surgical Operations and Benefits

(Applicable only to dependents whose Maximum Surgical Benefit determined in accordance with the Schedule of Insurance is \$300.00)

Description of Operation	Maximum Payment
Abdomen	
Appendectomy, freeing of adhesions or surgical exploration of the abdominal cavity	\$150.00
Removal of, or other operation on gall Bladder	225.00
Gastro-enterostomy	225.00
Resection of stomach, bowel or rectum.	300.00
Abscesses (See Tumors)	
Amputations	
Thigh, leg	187.50

Exhibit A—(Continued)

Section N—(Continued)

Description of Operation	Maximum Payment
Upper arm, forearm, entire hand or foot	150.00
Fingers or toes, each	22.50
Breast	
Removal of benign tumor or cyst requiring hospital confinement	75.00
Simple amputation	150.00
Radical amputation	225.00
Chest	
Complete thoracoplasty, transthoracic approach to stomach, diaphragm, or esophagus, sympathectomy or laryngectomy	300.00
Removal of lung or portion of lung	300.00
Bronchoscopy, esophagoscopy	60.00
Induction of artificial pneumothorax, initial	37.50
Refills each (not more than 12)	15.00
Dislocation, Reduction of	
Hip, ankle joint, elbow or knee joint (patella excepted)	52.50
Shoulder	37.50
Collar bone	30.00
Lower jaw, wrist or patella	22.50
For a dislocation requiring an open operation, the maximum will be twice the amount shown above.	

Exhibit A—(Continued)

Section N—(Continued)

Description of Operation	Maximum Payment
Excision or Fixation by Cutting	
Hip joint	225.00
Knee or elbow joint	187.50
Shoulder, semilunar cartilage, wrist or ankle joint	150.00
Removal of diseased portion of bone, including curettage (alveolar processes excepted)	75.00
Ear, Nose or Throat	
Fenestration, one or both ears	300.00
Mastoidectomy, one or both sides, simple	150.00
radical	225.00
Tonsillectomy, adenoidectomy, or both	50.00
Sinus operation by cutting (puncture of antrum excepted)	75.00
Submucous resection of nasal septum .	75.00
Tracheotomy	112.50
Any other cutting operation	22.50
Eye	
Operation for detached retina or corneal transplant	300.00
Cataract, removal of	225.00
Any other cutting operation into the eyeball (through the cornea or sclera) or cutting operation on eye muscles	150.00

Exhibit A—(Continued)

Section N—(Continued)

Description of Operation	Maximum Payment
Removal of eyeball	112.50
Any other cutting operation on eyeball	30.00
Fracture, Treatment of	
Thigh, vertebra or vertebrae, pelvis (coccyx excepted)	112.50
Leg, kneecap, upper arm, ankle (Potts)	75.00
Lower jaw (alveolar process excepted), collar bone, shoulder blade, forearm, wrist (Colles), skull	37.50
Hand, foot	22.50
Fingers or toes, each	15.00
Nose	15.00
Rib or ribs, three or more	37.50
fewer than three	15.00

The amounts shown above are for simple fractures.

For a compound fracture, the maximum will be one and one-half times the amount for the corresponding simple fracture.

For a fracture requiring an open operation, the maximum will be twice the amount for the corresponding simple fracture (bone grafting or bone splicing or metallic fixation at point of fracture considered as open operation).

Exhibit A—(Continued)

Section N—(Continued)

Description of Operation	Maximum Payment
Genito-Urinary Tract	
Removal of, or cutting into, kidney . . .	\$300.00
Fixation of kidney	225.00
Removal of tumors or stones in ureter or bladder	
By cutting operation	150.00
By endoscopic means	52.50
Cystoscopy	37.50
Removal of prostate by open operation	225.00
Removal of prostate by endoscopic means	150.00
Circumcision	22.50
Varicocele, hydrocele, orchidectomy or epididymectomy, single	75.00
bilateral	112.50
Hysterectomy	225.00
Other cutting operations on uterus and its appendages with abdominal ap- proach	150.00
Cervix amputation	75.00
Dilatation and curettage (non-puer- peral), cervix cauterization or coni- zation, polypectomy, or any combi- nation of these	37.50
Vaginal plastic operation for, cystocele or rectocele	112.50
Cystocele and rectocele	150.00
	[N-3]

Exhibit A—(Continued)

Section N—(Continued)

Description of Operation	Maximum Payment
Goitre	
Removal of thyroid, subtotal	225.00
Removal of adenoma or benign tumor of thyroid	150.00
Hernia	
Single hernia	150.00
More than one hernia	187.50
Joint	
Incision into, tapping excepted	37.50
Ligaments and Tendons	
Cutting or transplant, single	75.00
multiple	112.50
Suturing of tendon, single	52.50
multiple	75.00
Paracentesis	
Tapping	22.50
Pilonidal Cyst or Sinus	
Removal of	75.00
Rectum	
Hemorrhoidectomy, external	37.50
Internal, or internal and external	75.00
Cutting operation for fissure	37.50
Cutting operation for thrombosed hem- orrhoids	22.50
Cutting operation for fistula in anus, single	75.00
multiple	112.50

Exhibit A—(Continued)

Section N—(Continued)

Description of Operation	Maximum Payment
Skull	
Cutting into cranial cavity (trephine excepted)	300.00
Trephine	37.50
Spine or Spinal Cord	
Operation for spinal cord tumor	300.00
Operation with removal of portion of vertebra or vertebrae (except coccyx, transverse or spinous process)	225.00
Removal of part or all of coccyx, or of transverse or spinous process	75.00
Tumors	
Cutting operation for removal of one or more benign or superficial tumors, cysts or abscesses:	
Requiring hospital confinement ..	37.50
Not requiring hospital confinement	15.00
Malignant tumors of face, lip or skin	75.00
Varicose Veins	
Injection treatment, complete pro- cedure, one or both legs	60.00
Cutting operation, complete procedure, one leg	75.00
Both legs	112.50
Obstetrical Procedures	
Delivery of child or children	100.00
Caesarean section	100.00

Exhibit A—(Continued)

Section N—(Continued)

Description of Operation	Maximum Payment
Abdominal operation for extra-uterine pregnancy	150.00
Miscarriage	37.50

Except for operations expressly excepted in the Schedule, the Company shall, subject to the terms and conditions of this Policy, determine a payment for any cutting operation not listed in the Schedule consistent with the payment for any listed operation of comparable difficulty and complexity, but in no event shall such payment exceed the applicable Maximum Surgical Benefit. [N-4]

Section P

Group Medical Expense Insurance for Dependents
(Applicable to dependents of all employees)

Medical Expense Benefits. If any dependent of an employee receives medical treatment by a physician legally qualified to practice medicine, during the days of a period of hospital confinement for which daily benefits are payable under the Section of this Policy providing Hospital Expense Insurance for Dependents, a benefit is payable to the employee in an amount equal to the fees charged by the physician for each such treatment if received while the dependent is insured but not more than the amount obtained by multiplying the applicable rate of medical benefit specified in the provision entitled "Amounts of Insurance" contained herein by

Exhibit A—(Continued)

Section P—(Continued)

the number of days in such period of hospital confinement for which daily benefits are payable as described in the Section of this Policy entitled "Group Hospital Expense Insurance for Dependents," exclusive of any such days commencing with the date of an operation or procedure for which a benefit is payable under the Section of this Policy providing Surgical Operation Expense Insurance for Dependents and ending with the day on which the last treatment is received in connection therewith, but in no event shall the total amount payable for all treatments received during any one continuous period of disability exceed a sum equal to one hundred and eighty times said rate of medical benefit; provided that no benefit shall be payable for

(a) any treatment caused by or resulting from pregnancy, which term includes resulting childbirth or miscarriage; or

(b) dental work or treatment, or eye examinations or the fitting of glasses, or X-rays, drugs, dressings or medicine; or

(c) any treatment received in connection with and on or after the date of a surgical operation or procedure for which a benefit is payable under the Section of this Policy providing Surgical Operation Expense Insurance for Dependents; or

(d) any medical treatment for which a benefit is provided under the Sections of this Policy

Exhibit A—(Continued)

Section P—(Continued)

entitled "Group Hospital Expense Insurance for Dependents" and "Laboratory and X-Ray Examination Expense Insurance."

If any dependent of an employee is wholly disabled on the date the dependent's Medical Expense Insurance under this Policy ceases and receives medical treatment by a physician legally qualified to practice medicine, during the days of a period of hospital confinement, for which daily benefits are payable under the Section of this Policy providing Hospital Expense Insurance for Dependents which commences within three months after such date and during the continuance of such disability, the benefit hereinbefore described shall be payable to the employee for such treatment, provided such benefit would have been payable if the dependent's insurance had not ceased.

Treatments received during successive periods of hospital confinement shall be considered as having been received during one continuous period of disability unless complete recovery from the accidental bodily injury or disease which caused the previous period of hospital confinement has taken place before the subsequent period of hospital confinement commences, or unless the subsequent period of hospital confinement is due to an accidental bodily injury or disease entirely unrelated to the accidental bodily injury or disease which caused the previous period of hospital confinement. [P-1]

Exhibit A—(Continued)

Section Q

Group Laboratory and X-Ray Examination

Expense Insurance for Dependents

Laboratory and X-ray Examination Expense Benefits. If any dependent of an employee receives a laboratory examination or an X-ray examination specified in the Schedule of Laboratory and X-ray Examinations and Benefits contained herein and if such examination is made or recommended by a physician legally qualified to practice medicine in connection with a diagnosis of

(1) an accidental bodily injury which does not arise out of and in the course of employment, or

(2) a disease for which the dependent is not entitled to a benefit under any Workmen's Compensation Law or Act, Occupational Disease Law or Act or similar Law or Act,

a benefit is payable to the employee in an amount equal to the fees actually charged for each such examination if received while the dependent is insured, but not in excess of the maximum payment specified for such examination in said Schedule, except that if two or more of the examinations are received by the dependent in connection with any one accident or any one disease (the phrase "any one disease" shall include a recurrence of the disease unless complete recovery has intervened), the total amount payable shall not exceed the Maximum Laboratory and X-ray Expense Benefit specified in the provision entitled "Amounts of Insurance"

Exhibit A—(Continued)

Section Q—(Continued)

contained herein; provided that no payment shall be made for

(a) any examination received by a dependent while confined in a hospital if the dependent is entitled to any hospital expense benefits under the Section of this Policy providing Hospital Expense Insurance for Dependents during such confinement; or

(b) any examination due to or resulting from pregnancy, which term includes resulting childbirth or miscarriage; or

(c) any dental X-ray examination unless it is the result of an accidental bodily injury which does not arise out of and in the course of employment.

If any dependent of an employee is wholly disabled as a result of an injury or disease as hereinbefore described on the date the dependent's Laboratory and X-ray Expense Insurance under this Policy ceases and is thereby prevented from performing his usual activities, and receives an examination hereinbefore described, made or recommended by a physician legally qualified to practice medicine, within three months after the date his insurance ceased and during the continuance of such disability, the benefit hereinbefore described shall be payable to the employee for such examination, provided such benefit would have been payable if the dependent's insurance had not ceased. [Q-1]

Exhibit A—(Continued)

Section Q—(Continued)

Schedule of Laboratory and X-ray Examinations
and Benefits

Description of X-Ray Examination	Maximum Payment
Abdomen or organs therein (unless otherwise specified in this Schedule)	\$10.00
Arm or leg	5.00
Chest (heart and lungs)	10.00
1 bladder, kidney, ureter, or bladder— dye method	15.00
Gastrointestinal series—barium meal	25.00
Head (skull or sinuses)	10.00
Joints (shoulder, knee, elbow, ankle, wrist, hands, or feet)	5.00
Pelvis	10.00
Description of Laboratory Examination	Maximum Payment
Basal Metabolism Test	\$ 5.00
Electrocardiogram	7.50
Hinton, Kahn, or Kline Test (one or more types at one time to be considered one examination)	3.00
Malaria smear	2.00
Sputum Test	2.00
Sugar determinations, blood and urine (one of each)	5.00
Sugar Tolerance (three or more blood and urine determinations)	10.00
Wassermann Test	5.00

Exhibit A—(Continued)

The Company shall determine a consistent payment for any laboratory or X-ray examination not covered in this Schedule unless payment for the examination is expressly excepted by the other terms of this section of the Policy; provided, however, that such payment may be less than the smallest maximum payment listed but such payment shall in no event exceed the largest maximum payment listed. [Q-2]

Section T
General Provisions

Definitions. For the purpose of this Policy,

(1) an “Employer” shall be construed to mean each individual employer covered by collective bargaining agreement with a local of the IWA-CIO—Northwest Region providing Health and Welfare Benefits under the IWA Health and Welfare program or each Local Union or District Council in the IWA-CIO—Northwest Region, or the International Woodworkers of America—CIO;

(2) an “employee” shall be construed to mean a person who is employed by an Employer including the individual proprietors or partners where the Employer is an individual proprietor or partner;

(3) a “full-time employee” shall be construed to mean an employee whose regular working schedule with one Employer equals or exceeds twenty hours per week;

(4) “Basic Insurance” shall be construed to mean Life Insurance and Accidental Death and

Exhibit A—(Continued)

Section T—(Continued)

Dismemberment Insurance and Accident and Sickness Insurance (Non-occupational I and Occupational Benefits) provided under this Policy;

(5) "CUI Act" shall be construed to mean the California Unemployment Insurance Act;

(6) "UCD Benefits" shall be construed to mean Unemployment Compensation Disability Benefits provided in compliance with the CUI Act;

(7) "California Basic Insurance" shall be construed to mean Life Insurance and Accidental Death and Dismemberment Insurance and Accident and Sickness Insurance (Occupational Benefits and UCD Benefits) provided under this Policy and any Riders attached thereto;

(8) "Limited California Basic Insurance" shall be construed to mean Life Insurance and Accidental Death and Dismemberment Insurance and Accident and Sickness Insurance (Nonoccupational II and Occupational Benefits) provided under this Policy;

(9) "Employees Hospital and Allied Lines Insurance" shall be construed to mean Hospital Expense Insurance for Employees, Surgical Operation Expense Insurance for Employees, Medical Expense Insurance for Employees, Laboratory and X-Ray Examination Expense Insurance for Employees, and Supplemental Accident Expense Insurance for Employees provided under this Policy;

(10) "Dependents Hospital and Allied Lines Insurance" shall be construed to mean Hospital

Exhibit A—(Continued)

Section T—(Continued)

Expense Insurance for Dependents, Surgical Operation Expense Insurance for Dependents, Medical Expense Insurance for Dependents, and Laboratory and X-Ray Examination Expense Insurance for Dependents provided under this Policy;

(11) a “dependent” shall be construed to mean only each child of an employee during the period such child is over fourteen days of age but under nineteen years of age and unmarried, or the wife of an employee, none of whom is insured under this Policy as an employee or eligible to receive any benefits hereunder as the result of a disability existing when such insurance terminated;

(12) the “premium due date” shall be construed to mean the date on which the premium for all insurance under the Policy is due the Company and, when used with respect to an individual employee, shall mean the date on which the premium for the insurance of such employee under the Policy is due the Company. [T-1]

Eligible Class of Employees. The eligible class of employees shall include

(a) each full-time employee, if the work of such employee is covered by a Collective Bargaining Agreement of an Employer with a Local of the IWA-CIO—Northwest Region providing Health and Welfare Benefits under the IWA-Health and Welfare Program; and

(b) each full-time employee not included in

Exhibit A—(Continued)

Section T—(Continued)

subdivision (a) above, if his Employer by agreement with the Union makes insurance provided under this policy available to such full-time employees and such insurance is in force.

Insurance Available for an Employee in the Eligible Class. Basic Insurance, California Basic Insurance, Limited California Basic Insurance, Employees' Hospital and Allied Lines Insurance, whichever is applicable, shall be available for an employee included in (a) of the provision entitled "Eligible Class of Employees" in accordance with Table I below provided his Employer forwards to the Company the amount subject to the Collective Bargaining Agreement of his Employer with a local of the IWA-CIO—Northwest Region providing health and welfare benefits under the IWA Health and Welfare Program and provided his Employer is not entitled to or does not in fact deduct from such amounts the cost of any insurance except as permitted in such table.

Basic Insurance, California Basic Insurance, Limited California Basic Insurance, Employees' Hospital and Allied Lines Insurance, whichever is applicable, shall be available for an employee included in (b) of the provision entitled "Eligible Class of Employees" in accordance with Table I below provided that with respect to the insurance applicable (1) at least 75% of such employees of his Employer have made the required written appli-

Exhibit A—(Continued)

Section T—(Continued)

cation and wage deduction authorizations; and (2) the amount required in accordance with the Special Administrative Provisions of such employee has been paid; and (3) such employee has made the required written application and wage deduction authorization.

Dependents Hospital and Allied Lines Insurance shall be available for an employee included in (a) of the provision entitled "Eligible Class of Employees" in accordance with Table I below provided that (1) at least 75% of such employees with dependents made the required written application and wage deduction authorizations for such insurance; and (2) the required premium for such insurance of such an employee has been paid to the Company; and (3) such employee has made the required written application and wage deduction authorization.

Dependents Hospital and Allied Lines Insurance shall be available for an employee included in (a) of the provision entitled "Eligible Class of Employees" in accordance with Table I below provided that (1) at least 75% of such employees of his Employer with dependents have made the required written application and wage deduction authorizations for such insurance; and (2) the required premium for such insurance of such an employee has been paid to the Company; and (3) such employee has made the required written application and wage deduction authorization. [T-2]

Exhibit A—(Continued)

Section T—(Continued)

Table I

Basic Insurance

To Whom Available

An employee whose employment is not subject to the CUI Act.

Permissible Insurance Cost Deductions

The cost of insurance for another hospital insurance plan.

California Basic Insurance

To Whom Available

An employee whose employment is subject to the CUI Act and who is not insured by the California Unemployment Disability Fund or any Voluntary Plan as defined in the CUI Act other than the Rider to this Policy.

Permissible Insurance Cost Deductions

The cost of insurance for another hospital insurance plan.

Limited California Basic Insurance

To Whom Available

An employee whose employment is subject to the CUI Act and who is insured by the California Unemployment Disability Fund or any Voluntary Plan as defined in CUI Act other than the Rider to this Policy.

Permissible Insurance Cost Deductions

The cost of insurance for another hospital

Exhibit A—(Continued)

Section T—(Continued)

expense insurance plan and the amounts required to be paid for UCD Benefits provided by Unemployment Compensation Disability Fund or any Voluntary Plan as defined in the CUI Act other than the Rider to this Policy.

Employees Hospital and Allied
Lines Insurance

To Whom Available

An employee who is insured for one of the above basic insurances and who is a member of the class of employees of one Employer which class the Union has informed the Company in writing shall be insured for Employees Hospital and Allied Lines Insurance.

Permissible Insurance Cost Deductions

The amount required to be paid for UCD Benefits provided by Unemployment Compensation Disability Fund or any Voluntary Plan as defined in the CUI Act other than the Rider to this Policy.

Dependents Hospital and Allied
Lines Insurance

To Whom Available

An employee who is insured for Employees Hospital and Allied Lines Insurance.

Permissible Insurance Cost Deductions

The amount required to be paid for UCD Benefits provided by Unemployment Compens-

Exhibit A—(Continued)

Section T—(Continued)

sation Disability Fund or any Voluntary Plan as defined in the CUI Act other than the Rider to this Policy. [T-3]

Eligibility of Dependents. Each person who is a dependent of an employee to whom Dependents Hospital and Allied Lines Insurance is available on July 1, 1950, shall become eligible for such insurance coverages on said date.

Each person who is a dependent of an employee to whom Dependents Hospital and Allied Lines Insurance becomes available after July 1, 1950, shall become eligible for such insurance on the date such insurance coverages become available to the employee.

Each person who becomes a dependent of an employee after the date the Dependents Hospital and Allied Lines Insurance becomes available to the employee shall become eligible for such insurance on the date he becomes a dependent of the employee.

Effective Dates of Individual Insurance of Dependents. The Dependents Hospital and Allied Lines Insurance of an eligible dependent of an employee shall become effective on the latest of the following dates:

- (a) July 1, 1950;
- (b) the date the Employees Hospital Expense and Allied Lines Insurance of the employee becomes effective;
- (c) the date the employee makes written application and wage deduction authorization

Exhibit A—(Continued)

Section T—(Continued)

to insure his eligible dependents under this Policy for Dependents Hospital and Allied Lines Insurance.

An employee who has at least one insured dependent under this Policy shall not be required to make written application to insure additional dependents as each such additional dependent shall be automatically insured under this Policy on the date the additional dependent becomes eligible for insurance under this Policy.

An employee who makes written application and wage deduction authorization to insure his dependents more than thirty-one days after the date the dependents became eligible for insurance and an employee who reapplies for insurance after the insurance of his dependents has ceased for failure to make the required premium contribution may be required to furnish evidence of insurability, for each such dependent, satisfactory to the Company and without expense to it, before the insurance of any of his dependents shall become effective.

When an employee is required to furnish evidence of insurability of a dependent, the insurance of such dependent shall become effective on the date of approval by the Company at its Home Office of such evidence of insurability, provided the employee is then insured under the Policy. [T-5]

Discontinuance of Individual Insurance of Employees. Subject to the provision entitled "Waiver

Exhibit A—(Continued)

Section T—(Continued)

of Premium Benefit in the Event of Permanent and Total Disability'' contained in the Section of this Policy providing Group Life Insurance, and except as may be otherwise provided in the Rider attached hereto with respect to Unemployment Compensation Disability Benefits Insurance for Employees whose employment is subject to the California Unemployment Insurance Act, all insurance for which an employee is insured or any of either Basic Insurance, California Basic Insurance, Limited California Basic Insurance, or Employees Hospital and Allied Lines Insurance which may be available to the employee separately shall cease automatically on the earliest date set forth below:

(a) the date of termination of employment of an employee, which for the purposes of insurance shall be

(1) the last day of the sixth policy month following the policy month in which the employee ceases to actively work with an Employer, or the date of expiration of the period for which the employee is entitled to Accident and Sickness benefits under this Policy (or Unemployment Compensation Disability Benefits Insurance if applicable) whichever is later, unless during either period the employee actively works with an Employer; or

(2) the earlier date that the employee

Exhibit A—(Continued)

Section T—(Continued)

enters into the military or naval or air forces of any country, state, Union or Association thereof, at war whether such war be declared or undeclared;

(b) the date of termination of all or any such Insurance;

(c) the date of termination of membership of the employee in the class or classes eligible for all or any such Insurance under this Policy;

(d) the date of termination of all or any such Insurance on the class or classes of employees of which the employee is a member;

(e) the date of expiration of the period for which the last required premium payment for such Insurance is made from the Gross Advance Premium Account pursuant to the Special Administrative Provisions of this Policy;

(f) the date the employee becomes insured under another Group Policy providing accident and sickness benefits, except that an employee whose employment is subject to the California Unemployment Insurance Act may be insured under the Unemployment Compensation Disability Fund;

(g) the date of termination of this Policy;

(h) the date the employee ceases to be insured for a Basic Insurance under this Policy with respect to the Employees Hospital and Allied Lines Insurance. [T-6]

Exhibit A—(Continued)

Section T—(Continued)

Discontinuance of Individual Insurance of Dependents. The Dependents Hospital and Allied Lines Insurance of a dependent of an employee shall cease automatically on the earliest of the following dates:

(a) the date of termination of the Employee's Basic Insurance or the Employee's Hospital Expense Insurance under this Policy;

(b) the date the dependent becomes insured as an employee under this Policy;

(c) in the case of a child, the date the child attains the age of nineteen years, or the date of the child's prior marriage;

(d) in the case of a wife, the date of her divorce or legal separation from the employee;

(e) the date of termination of such Insurance under this Policy;

(f) the date of expiration of the period for which the last required premium contribution is made for such Insurance;

(g) the date of termination of this Policy. [T-7]

Amounts of Insurance. The amounts of insurance on any employee and any change in such amounts shall be based upon the following Schedule provided that in no event shall the amount of insurance be greater than the amount shown in the schedules below on account of any employee's employment with more than one Employer.

Exhibit A—(Continued)

Section T—(Continued)

Schedule of Insurance for
Employee Coverages

Coverages—Life Insurance.

Amount of Insurance—\$3000 (except Note 1).

Note 1. For an employee whose insurance becomes effective on a date on which he is not actively at work with an Employer and is not thereafter actively at work with an Employer, the amount of Life Insurance shall be an amount equal to the amount of his Life Insurance which ceased under another group policy because of expiration or other termination of such other group policy on the day immediately prior to such date, or \$3000, whichever is less.

Accidental Death and Dismemberment Insurance—3000 (Full Amount).

Accident and Sickness Insurance (Weekly Benefit)—Nonoccupational I (Applicable only to an employee whose employment is not subject to the CUI Act).

If disability commences while not actively at work as a full-time employee

70% of basic weekly wage but in no event to exceed \$25 per week (see Note 2).

If disability commences while actively at work as a full-time employee

70% of basic weekly wage but in no event to exceed \$40 per week.

Exhibit A—(Continued)

Section T—(Continued)

Nonoccupational II—(Applicable only to an employee whose employment is subject to the CUI Act and who is not insured for UCD Benefits under the Rider attached to this Policy).

70% of basic weekly wage, less any UCD Benefits payable but not including the additional benefit of \$8.00 per day payable by virtue of Section 209 of the CUI Act, but in no event to exceed \$15 per week.

Occupational—(Applicable to all Employees).

70% of basic weekly wages, less the amount per week to which the employee is entitled (or would be entitled in the event a lump sum payment is received in lieu of weekly payments) under any Workmen's Compensation Law or Act or Employer's Liability Law or Act or similar law or act, but in no event less than \$10 nor in excess of \$20.

Basic weekly wage is determined as the normal number of hours per week in the employee's work schedule, not to exceed forty hours, multiplied by the employee's hourly wage rate, exclusive of bonus or overtime. If the amount of benefit payable to an employee for a week or a fractional part of a week is not an even multiple of one dollar it shall be taken to the next higher dollar.

Note 2. The amount of weekly benefit of an employee whose disability commences while not ac-

Exhibit A—(Continued)

Section T—(Continued)

tively at work with an Employer and who is recalled to active work during the continuance of such disability shall be the same after the date of such recall as the above benefit specified for disability commencing while actively at work with an Employer as a full-time employee.

Employees Hospital Expense Insurance

Rate of Maximum Daily

Benefit \$ 10 (except Note 3)

Maximum Benefit for

Board and Room.... 1,800

Maximum Benefit for

Hospital Services ... 200

Maximum Combined

Hospital Maternity
and Obstetrical

Benefit 100

Note 3. With respect to an employee whose employment is subject to the CUI Act, such amount shall be reduced by \$8.00 for each day such employee is entitled to additional benefits for hospital confinement by virtue of Section 209 of said Act.

	Amount of
Coverages	Insurance
Employees Surgical Operation Expense Insurance	
Maximum Surgical Benefit as per	
Schedule in Section E.....	\$300

Exhibit A—(Continued)

Section T—(Continued)

Medical Expense Insurance for Employees

Rate of Medical Benefit in Physi-	
cian's Office and Hospital.....	3
Elsewhere including home	5
Maximum Medical Benefit.....	250

Laboratory and X-ray Examination Ex-
pense Insurance for Employees

Maximum Laboratory and X-ray Ex-	
amination Expense Benefit.....	50

Supplemental Accident Expense Insur-
ance for Employees

Maximum Expense Benefit	300
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The amounts of insurance on each dependent and any change in such amounts shall be based upon the following Schedule:

Schedule of Insurance for
Dependent Coverages

Coverages	Amount of Insurance
Hospital Expense Insurance for Dependents	
Rate of Maximum Daily Benefit.....	\$ 10
Maximum Benefit for Board and Room	1,800
Maximum Benefit for Hospital Services	200
Maximum Combined Hospital Mater- nity and Obstetrical Benefit.....	100

Exhibit A—(Continued)

Section T—(Continued)

Surgical Operation Expense Insurance for Dependents

Maximum Surgical Benefit as per Schedule in Section N.....	300
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Medical Expense Insurance for Dependents

Rate of Medical Benefit.....	3
Maximum Medical Benefit.....	540

Laboratory and X-ray Examination Expense Insurance

Maximum Laboratory and X-ray Ex- amination Expense Benefit	50
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[T-9]

Records Required. The Company shall keep a record with respect to each insured employee which shows the employee's name, age, and sex, the amount and effective date of his insurance, any change in the amount of his insurance and the effective date thereof, and the date his insurance is discontinued and the reason therefor.

It shall be the responsibility of the Union that the Company shall be furnished at its Portland Group Office, or at such of its other offices as it may in the future designate, with such information as the Company may require to enable it to administer the insurance and to determine the premiums therefor. Any records of the Union which have a bearing on the insurance hereunder shall be open to inspection by the Company.

Exhibit A—(Continued)

Section T—(Continued)

The Company shall be entitled to rely on the reports or records furnished to it by any Employer with respect to facts pertaining to eligibility of employees, discontinuance of insurance, premium contributions or hours worked, and the operation of any and all provisions of this Policy specifically including the Special Administrative Provisions contained herein, and shall also be entitled to rely on the records furnished to it by the Union relating to the Employers included under the Policy and the coverages for which such Employers are included.

Failure on the part of the Union or an Employer to record or to report to the Company the insurance of any employee who has fulfilled the requirements for coverage under this Policy shall not deprive such an employee of his insurance; nor shall failure on the part of the Union or an Employer to record or to report to the Company the termination of the insurance of any employee be construed as a continuation of such insurance beyond the date of termination determined in accordance with the provisions entitled "Discontinuance of Individual Insurance of Employees" or "Discontinuance of Individual Insurance of Dependents"; nor shall failure on the part of the Company to terminate the insurance of any employee make the Company liable to any other person insured under this Policy or to the Union.

Employee's Individual Certificate. The Company

Exhibit A—(Continued)

Section T—(Continued)

will issue to the Union for delivery to each insured employee an individual certificate setting forth the benefits to which such employee is entitled under this Policy, the name of the beneficiary, if any, designated by the employee, and the rights to which such employee is entitled in case of termination of his employment or termination of this Policy or of any Section hereof. Such certificate shall not constitute a part of this Policy.

Premium Payment. Other than premiums payable pursuant to the provisions of the "Grace Period" which exceed amounts remaining to the credit of the Gross Advance Premium Account which are actually received by the Company and other than Premiums for Dependents Hospital and Allied Lines Insurance, premiums for all insurance hereunder are payable solely from amounts remaining to the credit of the Gross Advance Premium Account which are actually received by the Company and are payable solely in accordance with the Special Administrative Provisions of the Policy. Premiums payable pursuant to the provisions of the "Grace Period" which exceed amounts remaining to the credit of the Gross Advance Premium Account which are actually received by the Company and premiums for Dependents Hospital and Allied Lines Insurance are payable at the Home Office of the Company in Boston or to a duly authorized agent presenting an official receipt signed by the

Exhibit A—(Continued)

Section T—(Continued)

President or Secretary, and countersigned by the agent designated thereon.

Premiums for all insurance hereunder are due and payable monthly in advance and in the manner prescribed above. On request of the Union, approved by the Company, premium payments may, if not then so payable, be changed on any policy anniversary, so as to be payable annually, semi-annually, quarterly, or monthly; in which event, the dates and provisions relating to the Special Administrative Provisions contained herein and to the payment of premiums for all insurance hereunder will be changed to conform to such modified periods of payment.

The payment of a premium for all insurance hereunder shall not maintain the insurance under this Policy in force beyond the date when the next premium becomes payable, except as hereinafter provided under the "Grace Period" provision. If the premium for all insurance hereunder is not paid on any premium due date in the manner prescribed above, this Policy shall terminate on the expiration of the last day immediately prior to such due date, except as hereinafter provided under the "Grace Period" provision. [T-10]

Except for insurance which is continued in accordance with the provisions of the Grace Period, the Company shall not be liable for any insurance benefits of any employee unless on the premium due date, pursuant to the Special Administrative Pro-

Exhibit A—(Continued)

Section T—(Continued)

visions of this Policy the entire premium due for all his insurance hereunder, other than Dependents' Hospital and Allied Lines Insurance has been debited against and paid from amounts remaining to the credit of the Gross Advance Premium Account and actually received by the Company and unless the entire premium due for his Dependents' Hospital and Allied Lines Insurance has been paid on such premium due date to the Company as prescribed above.

Grace Period. If the Union has not prior to any due date of the premium for all insurance hereunder given written notice to the Company that this Policy is to be terminated, a grace period of thirty-one days, without interest charge, during which the insurance under this Policy of employees for whom a premium payment is to be made from the Gross Advance Premium Account in accordance with the Special Administrative Provisions of this Policy on such premium due date shall remain in force, will be granted to the Union for the payment of each premium for all such insurance thereunder after the initial premium.

If the premium for all insurance hereunder is not paid in the manner prescribed in the provisions entitled "Premium Payment" and "Special Administrative Provisions" before the expiration of the days of grace, this Policy shall thereupon be terminated as provided in the provision entitled

Exhibit A—(Continued)

Section T—(Continued)

“Termination of this Policy” contained herein, but the Union shall, nevertheless, be liable to the Company for the payment of all premiums for all insurance hereunder then unpaid together with the premium for all insurance hereunder for the days of grace; except that if written notice is given by the Union to the Company during the grace period that the Policy is to be discontinued at an earlier date during the grace period, the Policy shall be terminated as provided in the provision entitled “Termination of this Policy” contained herein on such earlier date, or on the date of receipt of such written notice, whichever is later, but the Union shall nevertheless be liable to the Company for the payment of all premiums for all insurance hereunder then unpaid together with the pro rata premium for all insurance hereunder for the period commencing with the premium due date and ending with the date of termination of the Policy.

Premium Rates, Calculations and Adjustments. The initial basis of premium calculation for the coverages provided under this Policy shall be as set forth below; the Company reserves the right to fix new premium rates for any or all of the coverages provided under this Policy on any policy anniversary.

Exhibit A—(Continued)

Section T—(Continued)

Form of Insurance Accident and Sickness	Monthly Premium Rates
Nonoccupational I	\$.89 for each \$10.00 of Weekly Indemnity in force
Nonoccupational II	\$.99 for each \$10.00 of Weekly Indemnity in force (less 1% of the first \$3000 of taxable wages within the meaning of the term as used under the CUI Act)
Occupational	\$.31 for each \$10.00 of Weekly Indemnity in force
Hospital Expense for Employees other than Cali- fornia Employees	\$.131 for each \$1.00 of Maximum Daily Benefit in force
Hospital Expense for California Employees	\$.095 for each \$1.00 of Maximum Daily Benefit in force
Surgical Operation Expense for Employees	\$.19 for each \$100 of Maximum Surgical Benefit in force
Medical Expense for Employees	\$1.25 for each insured employee
Laboratory and X-ray Examination Expense for Employees	\$.24 for each insured employee
Supplemental Accident Expense for Employees	\$.09 for each insured employee
Hospital Expense for Dependents	\$.302 for each \$1.00 of Maximum Daily Benefit in force
Surgical Operation Expense for Dependents	\$.52 for each \$100 of Maximum Surgical Benefit in force
Medical Expense for Dependents	\$.065 for \$1.00 of Medical Benefit for each employee with insured dependents
Laboratory and X-ray Examination Expense for Dependents	\$.47 for each employee with insured dependents

Exhibit A—(Continued)

Section T—(Continued)

Premium for Changes in Insurance. Premium for additional or increased insurance becoming effective during a policy month shall be charged from the first day of the policy month next following the date such insurance becomes effective, except, in the event that at least 75% of all the eligible employees of an Employer become insured on one date a pro rata premium for such month shall be charged on such date for such insurance and the premium thereafter shall be charged on the first day of each policy month.

Premium charge for insurance terminating during a policy month shall cease at the end of the policy month in which the insurance terminates.

Payment of any balance due or credited on account of the first premium or adjustments in premiums due to changes in insurance by reason of additions, increases, and terminations will be due when determined.

Proof of Claim. (Applicable to all coverages except Life Insurance and Unemployment Compensation Disability Benefits Insurance.) All benefits provided in this Policy shall be paid, as stated in the following provision, upon receipt of written proof on the Company's forms or, if such forms are not furnished by the Company within fifteen days after demand therefor, then upon receipt of written proof covering the occurrence, character, and extent of the event for which claim is made.

Exhibit A—(Continued)

Section T—(Continued)

Payment of Claim. Claims made for benefits provided under this Policy shall be paid as follows:

(a) Life Insurance, if provided hereunder, is payable as set forth in Section A of this Policy;

(b) All Accidental Death and Dismemberment Insurance indemnities, if provided hereunder, will be paid immediately after receipt of due proof;

(i) indemnity for loss of life is payable to the beneficiary other than any Employer, if surviving the employee; otherwise, to the estate of the insured employee;

(ii) all other indemnities are payable to the employee;

(c) subject to due proof, all Accident and Sickness Insurance benefits other than benefits under the Unemployment Compensation Disability Benefits Insurance and Hospital Expense Insurance benefits, if provided hereunder, will be paid to the employee each week during any period for which the Company is liable and any balance remaining unpaid at the termination of such period will be paid to the employee immediately after receipt of due proof;

(d) any other benefits other than benefits under the Unemployment Compensation Disability Benefits Insurance provided under this

Exhibit A—(Continued)

Section T—(Continued)

Policy will be paid to the employee immediately after receipt of due proof.

Examination. (Applicable to all coverages, except Life Insurance and Unemployment Compensation Disability Benefits Insurance.) The Company shall have the right and opportunity to examine the person of the employee when and so often as it may reasonably require during the pendency of a claim under this Policy and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

Limitation of Action. (Applicable to all coverages, except Life Insurance and Unemployment Compensation Disability Benefits Insurance.) No action at law or in equity shall be brought to recover on this Policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this Policy, nor shall such action be brought at all unless brought within two years and ninety days after the date of loss upon which the cause of action is based.

If any time limitation of this Policy with respect to bringin an action at law or in equity to recover on this Policy is less than that permitted by the law of the state in which the insured resides at the time this Policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law. [T-13]

Modification of Policy. This Policy including but

Exhibit A—(Continued)

Section T—(Continued)

not limited to any and all Special Administrative Provisions in any respect may be amended or discontinued at any time by written agreement by the Company and the Union.

The Company reserves the right to fix new premium rates on April 1, 1951, and on each policy anniversary thereafter.

Termination of this Policy or amendments hereto shall not require the consent of or notice to any employee or beneficiary.

Only the President, a Vice President, the Secretary or an Assistant Secretary has power on behalf of the Company to make or modify this contract of insurance.

Termination of this Policy. If the Union gives written notice to the Company prior to the due date of any premium hereunder that this Policy is to be terminated at the end of the policy month immediately preceding such premium due date, this Policy shall then be terminated.

This Policy at the option of the Company, may be terminated at the end of any policy year, if the number of employees then insured hereunder is less than one hundred, or less than an average of five employees per Employer.

Termination of Insurance of Classes. If it is required that seventy-five per cent of certain em-

Exhibit A—(Continued)

Section T—(Continued)

ployees of an Employer make written application before certain insurance coverages become available to such employees, the Company shall have the right to terminate those insurance coverages for such employees on any premium due date by giving written notice to the Union and the Employers of such employees at least thirty-one days prior to such due date if less than seventy-five per cent of such employees then remain insured.

Annual Surplus Distribution. On each policy anniversary to which premiums have been paid, there shall be distributed hereon such share of a divisible surplus as may be apportioned hereto by the Company. Any such divisible surplus shall be paid in cash to the Union, or at the election of the Union, may be applied in abatement of premium payments.

Renewal. This Policy may be renewed on its first anniversary and on each subsequent anniversary without the issue or delivery of a new Policy for further terms of one year each in consideration of the payment of premiums determined as provided herein for the amount of insurance as renewed.

Entire Contract. This Policy, the application of the Union, a copy of which is attached hereto and made a part hereof, and the individual applications, if any, of the employees insured shall constitute the entire contract.

All statements made by the Union or by the individual employees insured hereunder shall be

Exhibit A—(Continued)

Section T—(Continued)

deemed representations and not warranties and no such statement shall be used in defense to a claim under this Policy unless it is contained in a written application signed by the applicant.

Non-Waiver of Policy Provisions. The failure on the part of the Company to perform or to insist upon the strict performance of any term, provision or condition of this Policy, including but not by way of limitation any term, provision or condition of any of the Special Administrative Provisions of this Policy, shall neither constitute a waiver on the part of the Company of its right to perform or require the performance of the term, provision or condition nor stop it from exercising any other rights it may have thereunder.

Neither Union nor any Employer Company's Agent. Neither the Union nor any Employer shall in any event be considered the agent of the Company for any purpose under this Policy. [T-14]

Section U

Special Administrative Provisions

1. Amounts forwarded to the Company for premium charges for Dependents Hospital and Allied Lines Insurance shall not be subject to the Special Administrative Provisions of this Policy.

2. Except for amounts forwarded to the Company for premium charges for Dependents Hospital and Allied Lines Insurance, the amount of all volun-

Exhibit A—(Continued)

Section U—(Continued)

tary cash contributions of an employee and of all monies forwarded to the Company by Employers on account of hours worked by an employee or pursuant to salary wage deduction authorizations of an employee shall be credited to an Individual Advance Premium Account of the employee.

3. The Individual Advance Premium Account of each employee for whom amounts have been credited for hours worked during the month of May, 1950, or June, 1950, shall be debited for each such month with the amount of 55c if the employee is insured for all employee coverages under the Policy, or 51c if the employee is insured only for Basic Insurance under the Policy. Such amounts shall be credited to the Gross Advance Premium Account.

4. Except as provided in paragraph 7 below, on each premium due date while the insurance of an employee under the Policy is in force, amounts shall be debited against the Individual Advance Premium Account of an employee as follows: (Such amounts are hereinafter referred to as the "Premium Due Date Debit" of an employee.)

Employees whose employment is not subject to the CUI Act—

(a) \$11.25 for an employee who is insured for Basic Insurance and for Employees Hospital and Allied Lines Insurance under the Policy;

Exhibit A—(Continued)

Section U—(Continued)

(b) \$7.75 for an employee who is insured for Basic Insurance under the Policy.

Employees whose employment is subject to the CUI Act—

(c) \$11.30 for an employee who is insured for California Basic Insurance and for California Employees Hospital and Allied Lines Insurance under the Policy;

(d) \$11.30 (less 1% of the first \$3,000 of taxable wages within the meaning of the term as used under the CUI Act) for an employee who is insured for Life Insurance, Accidental Death and Dismemberment Insurance, and Employees Hospital and Allied Lines Insurance under the Policy;

(e) \$8.16 for an employee who is insured for California Basic Insurance under the Policy;

(f) \$8.16 (less 1% of the first \$3,000 of taxable wages within the meaning of the term as used under the CUI Act) for an employee who is insured for Limited California Basic Insurance.

Such amounts shall be credited to the Gross Advance Premium Account. [U-1]

5. On each premium due date, the premium for all insurance under the Policy, other than Dependents Hospital and Allied Lines Insurance, determined in accordance with the provision of the

Exhibit A—(Continued)

Section U—(Continued)

Policy entitled "Premium Rates, Calculations and Adjustments" shall be debited against and paid from amounts credited to the Gross Advance Premium Account; provided, however, no such premium payment or debit shall be made against the Gross Advance Premium Account for the insurance of an employee who on any premium due date does not have to the credit of his Individual Advance Premium Account an amount equal to the sum of his Premium Due Date Debit and any debit then constituting a charge against his Individual Advance Premium Account;

unless on such premium due date he is entitled to receive accident and sickness benefits under either the Group Accident and Sickness provisions of the Policy or the Unemployment Compensation Disability Benefit provisions of the Rider to the Policy, or

unless the employee has, at any time during either of the two policy months preceding such premium due date, actively worked with an employer and such work is covered by collective bargaining agreement of such employer with a local of the IWA-CIO-Northwest Region providing health and welfare benefits under the IWA health and welfare program and is evidenced by records furnished the Company by such employer, or

unless the employee was not insured under the

Exhibit A—(Continued)

Section U—(Continued)

Policy at any time during either the second or third policy month preceding such premium due date, or

unless amounts received by the Company during the policy month preceding such premium due date for credit to his Individual Advance Premium Account together with the amount of the credit, if any, remaining to the Individual Advance Premium Account of the employee on such premium due date equals the amount of his premium due date debit.

6. No premiums for any insurance under the Policy other than Dependents Hospital and Allied Lines Insurance, shall be paid from the Gross Advance Premium Account except in accordance with paragraph 5 above.

7. If on any premium due date the Individual Advance Premium Account of an employee has to its credit an amount less than the sum of his Premium Due Date Debit and any debit then constituting a charge against his Individual Advance Premium Account, no amount shall be debited against the Individual Advance Premium Account of the employee or credited to the Gross Advance Premium Account except as follows:

(a) if the premium for the insurance of the employee is paid and debited from the Gross Advance Premium Account on such premium

Exhibit A—(Continued)

Section U—(Continued)

due date in accordance with the provisions of paragraph 5 above, the Individual Advance Premium Account of the employee shall be debited with the amount of credit, if any, remaining to such account and the Gross Advance Premium Account shall be credited with the amount of such debit, and

(i) if such credit is made to the Gross Advance Premium Account, the difference between his Premium Due Date Debit and the amount of such credit shall constitute a debit to be charged against the amounts, if any, subsequently credited to the Individual Advance Premium Account of the employee and, upon receipt of such amounts by the Company, they shall be credited to the Gross Advance Premium Account; or

(ii) if no such credit is made to the Gross Advance Premium Account, the amount of his Premium Due Date Debit shall constitute a debit to be charged against the amounts, if any, subsequently credited to the Individual Advance Premium Account of the employee and, upon receipt of such amounts by the Company, they shall be credited to the Gross Advance Premium Account. [U-2]

8. On the premium due date following each

Exhibit A—(Continued)

Section U—(Continued)

policy anniversary, the amounts remaining to the credit of the Individual Advance Premium Account of an employee in excess of his Premium Due Date Debit due on such premium due date shall be determined by the Company and shall be paid to the employee as soon as practicable.

9. Upon the termination of all of the insurance of an employee under the Policy, the amount remaining to the credit of his Individual Advance Premium Account shall be determined by the Company and shall be paid to the employee as soon as practicable.

10. Upon the termination of the Policy, all amounts remaining to the credit of the Gross Advance Premium Account in excess of premium due under this Policy shall be distributed, share and share alike, to the employees insured under the Policy as of the effective date of the termination of the Policy.

11. Interest, at such a rate, if any, as may be determined by the Company shall be payable for a policy month on the minimum amount of advance premiums which, at any time during such policy month, remain to the credit of both the Gross Advance Premium Account and the total of all the Individual Advance Premium Accounts to the extent that such minimum amount exceeds an amount equal to the sum of (1) the entire premium, other

Exhibit A—(Continued)

Section U—(Continued)

than the premium for Dependents Hospital and Allied Lines Insurance, due under the Policy on the first of such month, and (2) any of such advance premiums credited to any of said accounts but not then received by the Company. Such interest, if any, shall be credited to the Gross Advance Premium Account.

12. If on any premium due date and prior to payment of the premiums due under the Policy on such date, amounts to the credit of the Gross Advance Premium Account exceed an amount equal to

(a) four (4) times the Premium Due Date

Debit for all employees due on such date, plus

(b) any amounts credited to such account

but not then received by the Company.

such excess amount may be applied by the Company to pay Premium Due Date Debits or to provide additional insurance benefits under the Policy if the Company and the Union agree to such disposition in writing.

13. The Company shall have fully discharged its duty to pay any sum due to an employee under any of the Special Administrative Provisions of this Policy when it shall have mailed to the employee via United States mail, postage prepaid, its check or draft in the amount of such payment, addressed to such employee at the post office address furnished the Company by him or, if no such address has been

Exhibit A—(Continued)

Section U—(Continued)

so furnished by the employee, then addressed to the employee in care of the Employer who last forwarded any money to the Company pursuant to paragraph 1 above.

14. Anything contained herein to the contrary notwithstanding, no premiums for any insurance under the Policy shall be paid from the Gross Advance Premium Account on any premium due date unless there is a premium charge for the insurance of an employee and unless monies remaining to the credit of such account which are actually received by the Company equal the premium for all insurance under the Policy, other than Dependents Hospital and Allied Lines Insurance, due on such date; provided, however, if the insurance under the Policy is continued in accordance with the provisions of the Grace Period, all monies remaining to the credit of the Gross Advance Premium Account which are actually received by the Company shall be applied by the Company toward the payment of the premium for all insurance under the Policy for which the Union is liable to the Company under the provisions of the Grace Period. [U-3]

Exhibit A—(Continued)

Section U—(Continued)

Amendment

to be attached to and made a part of
Policy No. 7968-GMC
issued by the
John Hancock Mutual Life Insurance Company
Boston, Massachusetts
to
International Woodworkers of America—CIO
Portland, Oregon

It is understood and agreed that said Policy is hereby amended to provide that effective as of July 1, 1950, anything in said Policy to the contrary notwithstanding, with respect to all employees residing in the Dominion of Canada:

(1) all amounts to be received by the Company or paid by the Company under said Policy shall be in the lawful money of Canada and shall be receivable from or payable in the province in which the insured employee is domiciled or at the office of the Chief Agent of the Company in Canada: and

(2) all provisions of said Policy relative to change of beneficiary or to the rights or interest in insurance proceeds of any beneficiary or employee shall be subject to the applicable laws of the province pertaining thereto: and

(3) in order to enforce any obligation under said Policy may, subject to due service

Exhibit A—(Continued)

Section U—(Continued)

of legal process on the Company, be validly taken in any court of competent jurisdiction in any province of Canada.

Except as stated in this amendment, nothing contained herein shall be held to alter or affect any of the provisions of said Policy including any prior amendments and riders.

Boston, Massachusetts, November 1, 1950.

JOHN HANCOCK MUTUAL
LIFE INSURANCE
COMPANY,

/s/ ELMER L. FRENCH,
Secretary.

Countersigned,

/s/ HAROLD V. BROWN,
Registrar.

Form 1770.3.1-GMC

Ed. 7-50

Exhibit A—(Continued)

Section U—(Continued)

Amendment

to be attached to and made a part of

Policy No. 7968-GMC

issued by the

John Hancock Mutual Life Insurance Company

Boston, Massachusetts

to

International Woodworkers of America—CIO

Portland, Oregon

It is understood and agreed that said Policy is hereby amended to provide that effective as of July 1, 1950, anything in said Policy to the contrary notwithstanding, with respect to all employees residing in the Dominion of Canada:

(1) all amounts to be received by the Company or paid by the Company under said Policy shall be in the lawful money of Canada and shall be receivable from or payable in the province in which the insured employee is domiciled or at the office of the Chief Agent of the Company in Canada; and

(2) all provisions of said Policy relative to change of beneficiary or to the rights or interest in insurance proceeds of any beneficiary or employee shall be subject to the applicable laws of the province pertaining thereto; and

(3) an action to enforce any obligation under said Policy may, subject to due service

Exhibit A—(Continued)

Section U—(Continued)

of legal process on the Company, be validly taken in any court of competent jurisdiction in any province of Canada.

Except as stated in this amendment, nothing contained herein shall be held to alter or affect any of the provisions of said Policy including any prior amendments and riders.

Boston, Massachusetts, November 1, 1950.

JOHN HANCOCK MUTUAL
LIFE INSURANCE
COMPANY,

/s/ ELMER L. FRENCH,
Secretary.

Countersigned,

/s/ HAROLD V. BROWN,
Registrar.

Form 1770.3.1-GMC

Ed. 7-50

Application for Group Insurance

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

(Insert name of the Company)

Applicant hereby makes this a group policy on policies providing the insurance coverage specified in Item 1 hereof.

1. Total Name of John Hancock Mutual Life Insurance Company (Insert name of the Company)

2. Address 100 N. Main St., Boston, Mass.

3. The 100 N. Main St., Boston, Mass. (City, State, and Zip)

4. Name of John Hancock Mutual Life Insurance Company (Insert name of the Company)

5. Secretary or authorized agent of the Company

Name _____ Address _____ Relationship to Policyholder _____

6. Total Number of 100 Policies to be 100 (Insert number of policies to be issued)

7. Single Class of 100 Policies to be 100 (Insert number of policies to be issued)

8. Single Class of 100 Policies to be 100 (Insert number of policies to be issued)

9. Single Class of 100 Policies to be 100 (Insert number of policies to be issued)

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1. 100 Policies to be 100 (Insert number of policies to be issued)

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21. 100 Policies to be 100 (Insert number of policies to be issued)

22. 100 Policies to be 100 (Insert number of policies to be issued)

23. 100 Policies to be 100 (Insert number of policies to be issued)

24. 100 Policies to be 100 (Insert number of policies to be issued)

25. 100 Policies to be 100 (Insert number of policies to be issued)

This Policy Provides Group Insurance Coverage
As Shown on the Front Page Hereof

The holder of this Policy is hereby notified that by virtue thereof he is a member of the John Hancock Mutual Life Insurance Company and is entitled to vote either in person or by proxy at all meetings of said Company. The annual meetings are held at its Home Office on the second Monday of February in each year at twelve o'clock noon.

ASSIGNMENT OF DIVIDENDS, INCLUDING
DIVISIBLE SURPLUS, ARISING UNDER
GROUP INSURANCE POLICY No. 7968-
GMC ISSUED TO THE INTERNATIONAL
WOODWORKERS OF AMERICA-CIO

The International Woodworkers of America-CIO as the policyholder of Group Insurance Policy No. 7968-GMC issued by the John Hancock Mutual Life Insurance Company to the International Woodworkers of America-CIO hereby irrevocably assigns, sets over and transfers all its right, title and interest in and to any and all dividends which may be or become due and payable from time to time under the provisions of said group insurance policy or otherwise, and, without limiting the generality of the foregoing, specifically including any divisible surplus referred to under the General Provisions, 8th paragraph, page T-14 of the policy entitled "Annual Surplus Distribution," to the John Hancock Mutual Life Insurance Company to credit any and all such dividends to the Gross Advance Premium Account provided for under such policy for

application in accordance with the Special Administrative Provisions of said policy pertaining to monies credited to said Gross Advance Premium Account. Upon the crediting of such dividends as aforesaid, the John Hancock Mutual Life Insurance Company shall be delivered of any and all liability with respect to any such dividends.

In Witness Whereof, the International Woodworkers of America-CIO has caused this instrument to be signed by its duly authorized officer at Portland, Oregon, this 3rd day of February, 1951.

INTERNATIONAL WOODWORKERS OF
AMERICA-CIO,

By FADLING,
President.

HENRY J. McCARDLE,
Witness.

[Endorsed]: Filed April 25, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action was submitted on April 25, 1951, to the undersigned judge of the above-entitled court, sitting without a jury, on a Stipulation of Facts entered into by all parties who appeared in the action, viz.: Plaintiff Potlatch Forests, Inc., represented by Robert H. Elder, R. N. Elder and Sydney E. Smith, its attorneys; defend-

ant International Woodworkers of America and affiliated locals No. 10-358, 10-361, 10-119, 10-364, represented by their attorneys, William A. Babcock and W. B. Bowler; defendant John Hancock Mutual Life Insurance Company represented by its attorneys, Koerner, Young, McColloch & Dezen-dorf, Frank C. McColloch, Clarence J. Young and Ray E. Durham; and defendant employees of Rutledge unit as listed in Exhibit "F" of plaintiff's complaint, represented by their attorney, William S. Hawkins.

Thereafter briefs were filed and presented to the court on behalf of all of the parties so appearing. A study of the Stipulation of Facts and briefs of respective counsel was made by the court, and the court being fully advised in the premises, now makes the following:

Findings of Fact

I.

The above-named plaintiff, the Potlatch Forests, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Maine and authorized to do business in the State of Idaho. The plaintiff, Potlatch Forests, Inc., is engaged in the business of logging and the manufacturing of lumber and lumber products. It has its principal office and place of business at Lewiston, Idaho. It operates saw mills and other manufacturing facilities at Lewiston, Potlatch, and Coeur d'Alene, Idaho, and logging operations in the vicinity of Bovill and Headquarters, Idaho. The greatest part of its prod-

ucts is sold and shipped to points outside the state of Idaho. The plaintiff is engaged in interstate commerce within the meaning of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. The Collective Bargaining Agreement between the plaintiff and the defendant unions and any disputes which may arise thereunder affect interstate commerce within the meaning of the National Labor Relations Act as amended.

II.

The above-named defendant, International Woodworkers of America affiliated with the Congress of Industrial Organizations is an international labor organization and has affiliated with it the defendant's Local No. 10-358 of the International Woodworkers of America at Pierce, Idaho, and Local No. 10-361 of the International Woodworkers of America of St. Maries, Idaho, and Local No. 10-119 of the International Woodworkers of America, of Coeur d'Alene, Idaho, and Local No. 10-364 of the International Woodworkers of America of Lewiston, Idaho, all of such defendants having been designated and certified by the National Labor Relations Board pursuant to National Labor Relations Act as the bargaining agent of the production and maintenance employees of the plaintiff, the Potlatch Forests, Inc.

III.

The defendant, the John Hancock Mutual Life Insurance Company, is a corporation organized and existing under the laws of Massachusetts and

authorized to do business and write insurance within the state of Idaho.

IV.

The defendant, the North Idaho Service Bureau, is an association with its principal office at Lewiston, Idaho. The defendant, O. M. Husted, is a resident of Coeur d'Alene, Idaho, and is a practicing physician and surgeon.

V.

The defendant, R. E. Olson, and the other defendants named above are production and maintenance employees of the plaintiff, Potlatch Forests, Inc., employed at the plaintiff's plant at Coeur d'Alene, Idaho.

VI.

The ground upon which the jurisdiction of this court depends is the diversity of citizenship. The plaintiff is a corporation authorized and existing under and by virtue of the laws of the state of Maine. The defendant, the John Hancock Mutual Life Insurance Company, is a corporation organized and existing under and by virtue of the laws of the state of Massachusetts, and the defendants, the International Woodworkers of America, affiliated with the Congress of Industrial Organization, Local No. 10-358, Local No. 10-361, Local No. 10-119, Local No. 10-364, are all labor organizations operating within the State of Idaho. All of the other defendants named above are citizens of the state of Idaho and reside within the state of Idaho.

VII.

The matter in controversy herein exceeds exclusive of interest and costs the sum or value of Three Thousand Dollars (\$3,000.00).

VIII.

On or about the 14th day of July, 1950, the plaintiff, the Potlatch Forests, Inc., entered into a collective bargaining agreement with the defendants, the International Woodworkers of America, affiliated with the Congress of Industrial Organizations, and the defendants, Local No. 10-358 of Pierce, Idaho; Local No. 10-361 of St. Maries, Idaho, Local No. 10-119 of Coeur d'Alene, Idaho, and Local No. 10-364 of Lewiston, Idaho. A copy of said bargaining agreement is attached to plaintiff's complaint marked Exhibit "A" and by reference is hereby made a part of these Findings.

IX.

That said bargaining agreement among other things provided in Article XVIII thereof, entitled, Company Financed Health and Welfare, as follows:

(a) A Company-paid Health and Welfare program shall be financed as follows: Wage rates will be increased seven and one-half cents ($7\frac{1}{2}c$) per hour, effective June 1, 1950, as to employees on the pay roll on the date this agreement is executed, for the purpose of financing and paying for an employee benefit program. For scheduled hourly and piece rate workers the increase shall be converted in accordance

with the formula used in the past in making similar conversions.

(b) Each employee included within the bargaining unit under this agreement, upon execution of this agreement in his behalf by the Union as his duly certified collective bargaining agent, hereby authorizes and directs the Company, to deduct from his earnings each month the sum of 71½c for each hour worked by him or 60c per day for scheduled hourly employees and to pay said sum to such insurance carrier or carriers or hospital or physicians' organization legally authorized to do business in the state of Idaho as the Union or its authorized representatives may designate to be used exclusively for social benefits to inure to the benefit of the individual employee only. The Union shall notify the Company of the carrier or carriers or hospital or physicians' organization designated by it and the amount to be paid to each. The Company will cooperate with the Union and the insurance carrier or hospital or physicians' organization in securing necessary information for coverage. No employee, or former employee, shall have any claim, right, interest in or demand to said 71½c or said 60c, or any part thereof, or in the provisions of Article XVIII, except he shall receive the social benefits, insurance medical and surgical coverage, and dividends or refunds as provided under the policy or policies issued by the carrier or carriers as a result of negotiations by the Union with the carrier or carriers. No em-

ployee or former employee shall have any right or cause of suit or action and none shall be maintained under the provisions of this working agreement or otherwise against the Company or the Union by reason of the provisions of Article XVIII.

(c) Effective as soon as permitted by its present policies the Company shall forthwith terminate any existing employee social benefit programs to which the employee contributes. Under the provisions of paragraph (b) of this Article, the employee also authorizes a deduction from his earnings of a sum equal to the amount heretofore contributed by the Company to such existing programs, from and after the effective date of this Article for the purpose of defraying the cost of that program from that date until actually terminated.

(d) It is the intention of the Company and the Union that the foregoing program is in lieu of any similar or related programs requiring employer contributions under State and/or Federal law now existing or which may be hereafter enacted, and the parties hereto agree to amend the foregoing program, if necessary, from time to time to conform to and comply with any such legislation. If the foregoing is found to be in conflict with any Federal or State law, the parties agree to amend it to conform to the same.

X.

Beginning on the 1st day of June, the Potlatch

Forests, Inc., in accordance with provision XVIII of said bargaining agreement deducted from its 3,164 employees the sum of \$.071½ an hour and the sum of \$.60 per day from the scheduled hourly employees. Upon instructions from the International Woodworkers of America affiliated with the Congress of Industrial Organization and its above-named affiliated locals, the Potlatch Forests, Inc., in accordance with the terms of the contract, paid over the moneys so deducted:

a. The sum of \$3.50 per month for each employee to the above-named defendant, the North Idaho Medical Service Bureau, except the employees of the above-named plaintiff employed at its Coeur d'Alene plant and for such employees under the instructions received paid the sum of \$2.50 per month for each employee to Dr. O. M. Husted of Coeur d'Alene, Idaho, named above defendant.

b. The balance of said sum deducted from each employee was paid by the plaintiff under the instructions received from the Union to the defendant, the John Hancock Mutual Life Insurance Company.

That copies of the instructions received from the defendant, the International Woodworkers of America and the above-named affiliated locals, are attached to plaintiff's complaint and marked Exhibits "B," "C," "D," and "E" and by reference are made a part of these Findings.

XI.

The International Woodworkers of America affli-

ated with the Congress of Industrial Organizations, and its affiliated Locals, named as defendants above, entered into a contract for group insurance with the John Hancock Mutual Life Insurance Company covering all of the main employees within the bargaining unit of plaintiff's operations for life, accident, and health insurance. Said policy of insurance took effect on the 1st day of July, 1950, and a true and correct copy of said policy of insurance as amended is attached to the Stipulation of Facts herein marked Exhibit "A," and made a part of these Findings.

XII.

On September 6, 1950, the above-named plaintiff was served with a demand signed by 109 of its employees requesting that no further deductions be made on their earnings for the health and welfare program and that such sums heretofore deducted be returned to them immediately. Such employees signing said demand have been made defendants herein. Defendant unions named above contend that under Paragraph XVIII of Union Bargaining Agreement the plaintiff is required to deduct the \$.071½ per hour from each hour worked by all production and maintenance employees and to pay the sum out as the union may direct as set forth in Paragraph X above. The above-named defendant employees who signed the demand contend that the plaintiff has no right or authority to deduct said \$.071½ from their earnings without an individual authorization signed by the employee. None of plaintiff's employees have signed individual's authorizations for said deduction.

Under the terms of the union bargaining agreement, and Paragraph XVIII in particular, the plaintiff has during the months of June, 1950, to March, 1951, both inclusive, deducted from the earnings of its employees the sum of \$407,600.15 and paid said sum out under direction from the union as set forth more particularly in Paragraph X above. During the life of the contract the plaintiff will deduct from the earnings of its employees and pay out in accordance with instructions from the union approximately \$770,000.00.

XIII.

Plaintiff contends that said bargaining agreement is valid and binding upon the company and that individual authorizations from each employee are not necessary or required in view of Paragraph XVIII of the bargaining agreement set out in Paragraph IX above wherein the bargaining agent of the employees authorizes the deduction to be made from the earnings of each production and maintenance employee within the bargaining unit, but that the claim of the above-named employees named as defendants and all other employees similarly situated that Article XVIII of said contract is not valid and that individual authorizations are necessary, presents a matter of actual controversy between the parties and raises a question of the validity of Article XVIII of said agreement.

Based upon the foregoing Findings of Fact. the court now makes and enters the following:

Conclusions of Law

I.

The collective bargaining agreement entered into on or about July 14, 1950, effective June 1, 1950, providing for a health and welfare program by the payment of 7½c per hour for each hour worked by employees in the bargaining unit, or 60c per day for scheduled hourly employees, by the employer to an insurance carrier or to a hospital or to physicians designated by the union, is valid and binding on the parties.

II.

The wage rate increase of 7½c per hour provided by said agreement was not intended by the parties as an unqualified wage increase separate and apart from the employees' health and welfare program, and it was not intended that said increase be wages for an employee to draw if he did not desire the benefits of the insurance program provided for in said agreement.

III.

The demand made by individual employees that no further deductions be made on their earnings for the health and welfare program and that sums theretofore deducted be returned to them immediately was and is of no force or effect and cannot be acceded to by plaintiff.

IV.

Said collective bargaining agreement does not violate Sec. 302 of the Labor Management Relations Act of 1947 (29 U.S.C. 186) or any other provision of said Act.

V.

The defendant unions, as representatives of the employees, under the provisions of Sec. 8(a)5, Sec. 8(b)3, and Sec. 9(a) of the National Labor Relations Act, as amended, had authority to enter into said collective bargaining agreement providing for payments of 7½¢ per hour for each hour worked or 60¢ per day for scheduled hourly employees, to an insurance carrier or to a hospital or to physicians designated by the union, and such agreement does not in any way violate any statutory or constitutional rights of the employees.

VI.

Plaintiff employer, party to said agreement, has been and is authorized and obligated under said collective bargaining agreement commencing as of June 1, 1950, to make such deductions and payments without obtaining authorizations from individual employees and without regard to objections by such employees, and deductions and payments so made are not prohibited by any state or federal law.

VII.

Plaintiff is entitled to a declaratory judgment embodying the foregoing Conclusions of Law.

Dated at Boise, Idaho, this 22nd day of September, 1951.

/s/ CHASE A. CLARK,

District Judge.

[Endorsed]: Filed September 22, 1951.

United States District Court, District of Idaho,
Northern Division

No. 1808

POTLATCH FORESTS, INC.,

Plaintiff,

vs.

INTERNATIONAL WOODWORKERS OF AMERICA, Affiliated With the CONGRESS OF INDUSTRIAL ORGANIZATIONS, LOCAL No. 10-358, of the INTERNATIONAL WOODWORKERS OF AMERICA, at Pierce, Idaho, and LOCAL No. 10-361 of the INTERNATIONAL WOODWORKERS OF AMERICA, of St. Maries, Idaho; and LOCAL No. 10-119 of the INTERNATIONAL WOODWORKERS OF AMERICA, of Coeur d'Alene, Idaho; and LOCAL No. 10-364 of the INTERNATIONAL WOODWORKERS OF AMERICA, of Lewiston, Idaho; JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; THE NORTH IDAHO SERVICE BUREAU; O. M. HUSTED, R. E. OLSEN, JAMES M. KING, BERT DAVIDSON, JOHN A. FOGLESONG, LESTER A. CLEMENTSON, OTIS NUSTAD, FRANK ANDREWS, JOE BJORNSTAD, CECIL McMILLIN, BEN JOHNSON, HAROLD A. STANDAHL, STANLEY C. PARRIOTT, WILMER MOORE, LELAND SANDE, STANLEY M. WEST, LYNELLE T. RABUN, HOMER COGSWELL, HOWARD ELY, GILMAN

MOORE, GAIL L. BARRY, AMOS E. LIBBY, DAVID NICHOLS, E. A. DUFFIELD, C. C. BUEGE, W. A. JARDINE, WAYNE DAVIS, W. R. SWEITZER, JR., ED DENISON, VERNE EATON, WESLEY A. OLSON, CHARLES L. WALTON, ESQ., W. E. OVE-SON, W. G. PETERS, AXEL HOLMBLAD, LEONARD W. KERBER, JOHN G. Mac- DONALD, W. E. BENSON, LOUIS OLSON, DONALD N. TOSH, CARL W. NUMAN, JOE BRANDVOLD, ROY BJAALAND, C. R. KOCHER, GEORGE GROSE, WILLIAM E. MATTSO, GARDNER TEALL, CHET E. ROATH, JAMES D. WRIGHT, ARNOLD DAVIDSON, JERRY MARKUSO, AL ROSENLU, WILLIAM E. FORMAN, ARNOLD H. OLSON, GEORGE ERICKSON, ADOLPH OLSON, BERNARD W. VALEN- TINE, HALVOR BRUSTAD, RICHARD H. McCOWEN, JOHN W. PINKLEY, HAROLD SONNICHSEN, HARRY H. FIELDS, BILL OVERBAY, GUST JOHNSON, CRAIG D. WILCOX, HARRY R. FIELDS, JOHN D. MARSON, A. A. FORNESS, H. C. KIEPER, SAM LANORE, L. E. KELLY, M. C. ADAMS, WILLIAM H. HEBERT, CLIFFORD F. ANDERSON, L. E. ACRE, HERBERT C. MENSCH, JOHN HURRELL, LEMUEL R. CEDERBLOOM, ROBERT G. TEAL, FRANK F. KNOX, JOHN CARLSON, VIC- TOR DAHLSTROM, BERTIL KNUTSON, LOUIS R. ACRE, LAWRENCE L. HARMON, JAY W. GIBBS, JOHN A. BARBER,

JOHNNY CARLSON, JAMES A. ROE, OLIVER BRECTO, OSCAR C. OLSON, FRED L. STEPHENSON, HOWARD STAPLES, HOWARD M. ELDER, LLOYD MOE, JAY B. CARPENTER, ALVIN A. BATCH-ELDER, EINAR H. HOLMBLAD, CLAUDE H. RAWSON, HENRY O. BJAALAND, GEORGE DILL, PAUL ANTONSON, VICTOR LEINUM, LEONARD E. GERMAN, L. H. MENSCH, RAY JANUSCH, RICHARD R. YOUNG, JOHN W. SPRACKLIN, JOHN GITTEL, ROBERT MARRHEWS; and ALL OTHER PRODUCTION AND MAINTENANCE EMPLOYEES OF THE PLAINTIFF SIMILARLY SITUATED,

Defendants.

DECLARATORY JUDGMENT AND DECREE

The above-entitled action was submitted on April 25, 1951, to the undersigned judge of the above-entitled court, sitting without a jury, on a stipulation of facts entered into by all parties who appeared in the action, viz: plaintiff, Potlatch Forests, Inc., represented by Robert H. Elder, R. N. Elder and Sydney E. Smith, its attorneys; defendant, International Woodworkers of America and affiliated locals Nos. 10-358, 10-361, 10-119, 10-364, represented by their attorneys William A. Babcock and W. B. Bowler; defendant, John Hancock, Mutual Life Insurance Company, represented by its at-

torneys Koerner, Young, McColloch & Dezendorf, Frank C. McCollock, Clarence J. Young and Ray E. Durham; and defendant, employees of Rutledge unit as listed in Exhibit "F" of plaintiff's complaint, represented by their attorney William S. Hawkins.

Thereafter briefs were filed and presented to the court on behalf of all of the parties so appearing. A study of the stipulation of facts and briefs of respective counsel was made by the court, and the court being fully advised in the premises, made and entered in writing its Findings of Fact and Conclusions of Law. Now, therefore, it is

Ordered, Adjudged and Decreed that the collective bargaining agreement entered into on or about July 14, 1950, effective June 1, 1950, providing for a health and welfare program by the payment of 71½c per hour for each hour worked by employees in the bargaining unit, or 60c per day for scheduled hourly employees, by the employer to an insurance carrier or to a hospital or to physicians designated by the union, is valid and binding on the parties. It is further

Ordered, Adjudged and Decreed that the wage rate increase of 71½c per hour provided by said agreement was not intended by the parties as an unqualified wage increase separate and apart from the employees' health and welfare program, and it was not intended that said increase be wages for an employee to draw if he did not desire the benefits of the insurance program provided for in said agreement. It is further

Ordered, Adjudged and Decreed that the demand made by individual employees that no further deductions be made on their earnings for the health and welfare program and that sums theretofore deducted be returned to them immediately, was and is of no force or effect and cannot be acceded to by plaintiff. It is further

Ordered, Adjudged and Decreed that said collective bargaining agreement does not violate Sec. 302 of the Labor Management Relations Act of 1947 (29 U.S.C. 186), or any other provision of said Act. It is further

Ordered, Adjudged and Decreed that defendant Unions, as representatives of the employees, under the provisions of Sec. 8 (a) 5, Sec. 8 (b) 3, and Sec. 9 (a) of the National Labor Relations Act, as amended, had authority to enter into said collective bargaining agreement providing for payments of 71½c per hour for each hour worked or 60c per day for scheduled hourly employees, to an insurance carrier or to a hospital or to physicians designated by the union, and such agreement does not in any way violate any statutory or constitutional rights of the employees. It is further

Ordered, Adjudged and Decreed that plaintiff employer, party to said agreement, has been and is authorized and obligated under said collective bargaining agreement commencing as of June 1, 1950, to make such deductions and payments without obtaining authorizations from individual employees and without regard to objections by such employees,

and deductions and payments so made are not prohibited by any state or federal law.

Dated at Boise, Idaho, this 22nd day of Sept., 1951.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed September 22, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that R. E. Olson, James M. King, Bert Davidson, John A. Foglesong, Lester A. Clemetson, Otis Nustad, Frank Andrews, Joe Bjornstad, Cecil McMillin, Ben Johnson, Harold A. Standahl, Stanley C. Parriott, Wilmer Moore, Leland Sande, Stanley M. West, Lynelle T. Rabun, Homer Cogswell, Howard Ely, Gilman Moore, Gail L. Barry, Amos E. Libby, David Nichols, E. A. Duffield, C. C. Buege, W. A. Jardine, Wayne Davis, W. R. Sweitzer, Jr., Ed Denison, Verne Eaton, Wesley A. Olson, Charles L. Walton, Esq., W. E. Oveson, W. G. Peters, Axel Holmblad, Leonard W. Kerber, John G. MacDonald, W. E. Benson, Louis Olson, Donald N. Tosh, Carl W. Numan, Joe Brandvold, Roy Bjaaland, C. A. Kochel, George Grose, William E. Mattson, Gardner Teall, Chet E. Roath, James D. Wright, Arnold Davidson, Jerry Markuson, Al Rosenlund, William E. Forman, Arnold H. Olson, George Erickson, Adolph Olson, Bernard

W. Valentine, Halvor Brustad, Richard H. McCowen, John W. Pinkley, Harold Sonnichsen, Harry H. Fields, Bill Overbay, Gust Johnson, Craig D. Wilcox, Harry R. Fields, John D. Marson, A. A. Forness, H. C. Kieper, Sam Lanore, L. E. Kelly, M. C. Adams, William H. Hebert, Clifford F. Anderson, L. E. Acre, Herbert C. Mensch, John Hurrell, Lemuel R. Cederbloom, Robert G. Teal, Frank F. Knox, John Carlson, Victor Dahlstrom, Bertil Knutson, Louis R. Acre, Lawrence L. Harmon, Jay W. Gibbs, John A. Barber, Johnny Carlson, James A. Roe, Oliver Brecto, Oscar C. Olson, Fred L. Stephenson, Howard Staples, Howard M. Elder, Lloyd Moe, Jay B. Carpenter, Alvin A. Batchelder, Einar H. Holmblad, Claude H. Rawson, Henry O. Bjaaland, George Dill, Paul Antonson, Victor Leinum, Leonard E. German, L. H. Mensch, Ray Janusch, Richard R. Young, John W. Spracklin, John Gittel and Robert Marrhews, defendants above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the file Declaratory Judgment and Decree entered in this action on September 22, 1951.

/s/ E. L. MILLER,

/s/ W. S. HAWKINS,

Attorneys for Appellants
Above Named.

Receipt of copy acknowledged.

[Endorsed]: Filed October 22, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint for Declaratory Relief.
2. Answer of R. E. Olson, et al.
3. Stipulation of Facts.
4. Minute entry of April 25, 1951.
5. Minute entry of May 24, 1951.
6. Findings of Fact and Conclusions of Law.
7. Declaratory Judgment and Decree.
8. Notice of Appeal.
9. Undertaking on Appeal.
10. Statement of Points.
11. Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 7th day of November, 1951.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 13155. United States Court of Appeals for the Ninth Circuit. R. E. Olson, et al., Appellant, vs. Potlatch Forests, Inc., a Corporation; John Hancock Mutual Life Insurance Company; International Woodworkers of America, Affiliated With the Congress of Industrial Organizations, Local No. 10-358, of the International Woodworkers of America, at Pierce, Idaho, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed November 9, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Pursuant to Rule 19 of the United States Court of Appeals for the Ninth Circuit, the defendant-appellants designate the following points upon which appellants will rely on appeal:

I.

The court erred in entering its Declaratory Judgment and Decree in favor of the plaintiff and against these defendants.

II.

The Court erred in entering its Findings of Facts and Conclusions of Law herein.

III.

The court erred in adjudging and decreeing that the defendant unions as representatives of the employees under the provisions of Sec. 8 (a) 5, Sec. 8 (b) 3, and Sec. 9 (a) of the National Labor Relations Act, as amended, had authority to enter into said collective bargaining agreement providing for payments of 7½c per hour for each hour worked or 60c per day for scheduled hourly employees, to an insurance carrier or to a hospital or to physicians designated by the union, and such agreement does not in any way violate any statutory or constitutional rights of the employees.

IV.

The court erred in adjudging and decreeing that the collective bargaining agreement does not violate Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C. 186), or any other provision of said Act.

V.

The court erred in adjudging and decreeing that the demand made by the individual employees that no further deductions be made on their earnings for the Health and Welfare Program and that sums theretofore deducted be returned to them immediately was and is of no force and effect and cannot be acceded to by the plaintiff.

VI.

The court erred in ordering, adjudging and decreeing that the wage rate increase of 7½c per hour provided by said agreement was not intended by the parties as an unqualified wage increase separate

and apart from the employees Health and Welfare Program, and it was not intended that said increase be wages for an employee to draw if he did not desire the benefits of the insurance program provided for in said agreement.

VII.

The Court erred in adjudging and decreeing that the collective bargaining agreement entered into on or about July 14, 1950, effective June 1, 1950, providing for a health and welfare program by the payment of 71½c per hour for each hour worked by employees in the bargaining unit, or 60c per day for scheduled hourly employees, by the employer to an insurance carrier or to a hospital or to physicians designated by the union, is valid and binding on the parties.

VIII.

The court erred in adjudging and decreeing that plaintiff employer, party to said agreement, has been and is authorized and obligated under said collective bargaining agreement commencing as of June 1, 1950, to make such deductions and payments without obtaining authorizations from individual employees and without regard to objections by such employees, and deductions and payments so made are not prohibited by any state or federal law.

/s/ WM. S. HAWKINS,

/s/ E. L. MILLER,

Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed December 1, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure and Rule 19 of the United States Court of Appeals for the Ninth Circuit the defendant-appellants hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by Notice of Appeal filed October 22, 1951, the following portions of the records, proceedings and evidence of this action.

1. The Complaint.
2. The Answer of these Appellants and Defendants.
3. Stipulation of Facts.
4. Findings of Fact and Conclusions of Law.
5. Declaratory Judgment and Decree.
6. Notice of Appeal.
7. Statement of Points on Appeal.
8. This Designation and Journal Entries.

/s/ WM. S. HAWKINS,

/s/ E. L. MILLER,

Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed December 1, 1951.

United States
Court of Appeals
For the Ninth Circuit

R. E. OLSEN, et al.,

Appellants,

vs.

POTLATCH FORESTS, INC., a Corporation;
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; INTERNATIONAL WOODWORKERS OF AMERICA, Affiliated With the Congress of Industrial Organizations, LOCAL No. 10-358, of the International Woodworkers of America, at Pierce, Idaho, et al.,

Appellees.

Brief of Appellants

*Appeal from the United States District Court,
for the District of Idaho,
Northern Division*

FILED

MAR 24 1952

WILLIAM S. HAWKINS,

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Coeur d'Alene, Idaho,

Attorneys for Appellants.

PAUL P. O'BRIEN
CLERK

United States
Court of Appeals
For the Ninth Circuit

R. E. OLSEN, et al.,

Appellants,

vs.

POTLATCH FORESTS, INC., a Corporation;
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; INTERNATIONAL WOODWORKERS OF AMERICA, Affiliated With the Congress of Industrial Organizations, LOCAL No. 10-358, of the International Woodworkers of America, at Pierce, Idaho, et al.,

Appellees.

Brief of Appellants

*Appeal from the United States District Court,
for the District of Idaho,
Northern Division*

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Coeur d'Alene, Idaho,

Attorneys for Appellants.

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United States
Court of Appeals
For the Ninth Circuit

R. E. OLSEN, et al.,

Appellants,

vs.

POTLATCH FORESTS, INC., a Corporation;
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; INTERNATIONAL WOODWORKERS OF AMERICA, Affiliated With the Congress of Industrial Organizations, LOCAL No. 10-358, of the International Woodworkers of America, at Pierce, Idaho, et al.,

Appellees.

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS FOR JURISDICTION

This action was commenced by appellees, Potlatch Forests, Inc. by the filing of a complaint in and the issuance of a summons from the District Court of the United States, for the Northern Division of Idaho.

Appellee, Potlatch Forests, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Maine (P. 5) and is engaged in interstate commerce within the meaning of the "Labor Management Relation's Act, 1947." That the contract

and issues involved in this proceeding affect interstate commerce within the meaning of that act.

Defendant, International Woodworkers of America, affiliated with C.I.O. is an international labor organization and has affiliated with it the defendants Locals No. 10-358, 10-361, 10-119, and 10-364 of the said I.W.A. (P. 5 & 6).

The defendant, appellee, John Hancock Mutual Life Insurance Company is a corporation organized and existing under the laws of the State of Massachusetts (P. 6).

The individual appellants named in the Notice of Appeal are all residents and citizens of the State of Idaho. (P. 6 & 7).

The statutory provisions which sustain the jurisdiction of the District Court are:

28 U. S. C. A. 1333

29 U. S. C. A. 185

The statutory provision which sustains the jurisdiction of the United States Court of Appeals is:

28 U. S. C. A. 1291

STATEMENT OF THE CASE

This action was instituted by Potlatch Forests, Inc. seeking a declaratory judgment finding that a contract entered into between it and the I.W.A. and its locals be declared valid, enforceable and unaffected by any law of the State of Idaho and of the United States.

The contract involved was entered into on July 14, 1950, between Potlatch Forests, Inc. and the International Woodworkers of America, affiliated with C.I.O. being the collective bargaining agency under the Labor Management Relations Act of 1947 for all maintenance and production employees of the Potlatch Forests, Inc. The appellants are among those employees, but a majority of them are not members of the unions or locals herein referred to (P. 23).

That the portion of said bargaining agreement herein involved is Article XVIII entitled "Company Financed Health and Welfare" and is set forth verbatim at pages 8, 9, and 10 of the Transcript of Record and authorizes the Potlatch Forests, Inc. to deduct from the wages of all of its maintenance and production employees 7½c per hour or 60c per day and pay that sum to the John Hancock Mutual Life Insurance Company for the purpose of "financing and paying for an employee benefit fund." (P. 8).

The contract was entered into between the Potlatch Forests, Inc. and I.W.A. acting through its committee.

No authorizations for such deductions have been signed by any employee. (P. 35-36).

These appellants, a majority of whom are non-members of the I.W.A. requested on September 6, 1950 that "nothing more be deducted from our pay checks in favor of the Health and Welfare Fund; and that such sums that have already been deducted be returned." (P. 20).

The validity of such contract is thus challenged and it is by the appellants contended that individual authorizations from each employee are required.

It is further contended that the 7½c per hour increase allowed to the employees and taken from them by the employer to pay for said Health and Welfare program constitutes a wage increase and cannot, without the signed authorization of the employee, be so taken and applied.

SPECIFICATION OF ERRORS

I.

The court erred in adjudging that the appellee unions had the right and authority to enter into the contractual provisions of Article XVIII of the Bargaining Agreement for the purposes therein set forth.

II.

The court erred in adjudging that the 7½c per hour was not a wage increase, for an employee to draw if he did not desire the insurance program.

III.

The court erred in adjudging that said 7½c per hour could be withheld from the employee and by the company paid to John Hancock Insurance Company designated by the Union without the signed authorization of the employee.

IV.

The court erred in adjudging that these individual appellants are not entitled to have returned to them deductions already made.

V.

The court erred in adjudging that said agreement does not violate the provisions of 29 U. S. C. A. 186.

VI.

The court erred in adjudging that the Union, through its bargaining committee, had authority to enter into said agreement to buy insurance, to be financed out of wages, and that to permit the same does not violate any statutory or constitutional right of the employee appellants.

SUMMARY

It is the contention of Appellant employees that the Respondent employer and unions cannot circumvent the plain terms and provisions of 29 U. S. C. A. 186, nor its intent, by granting a wage increase of $7\frac{1}{2}$ c per hour and then, without signed authorizations, in a compulsory manner deduct those earnings for health and welfare purposes.

The majority of Appellants are non-members of the unions involved. Their wage rates were increased $7\frac{1}{2}$ c per hour. Those wages vest in the employee and are then withheld from his paycheck without his signed authorization in order to pay for a "company financed" health and welfare program.

It is not contended that the Company employer cannot negotiate with the Union for the purpose of providing out of company funds, a health and welfare program. But it is contended that the same cannot, without his signed authorization, be financed by wage deductions in violation of the "Labor Management Relations Act, 1947.

ARGUMENT

The "Labor Management Relations Act, 1947" (29 U. S. C. A. 141 et seq.) expressly prohibits the doing of that which has been done in this case.

"The provisions of the act dealing with union welfare funds are inadequate in many respects, and the whole subject requires further study, with probably a much more fundamental regulation. Section 302 (29 U. S. C. A. 186) was written larely to prevent the payment into welfare funds of moneys earned by employees, calling for compulsory deductions, the proceeds often completely at the disposition of labor unions. To a certain extent, the law has resulted in a much more impartial supervision and audit of these funds and has protected the equal rights of the employees entitled to participate."

Vol. 25 L. R. R. M. 41
Majority Report of Joint
Congressional Committee on
Taft Act. December 31, 1948

In the light of the foregoing report, the contract in the instant case is violative of the act as well as the intent of Congress.

From the material available, no similar case has been found. That is, where wages are increased and then taken for health and welfare purposes.

The procedure normally followed appears to be such as that as is contained in the contract between Ford Motor Company and the Union (U.A.W.-CIO).

24 L. R. R. M. 3

"RETIREMENT PLAN

"Sec. 1. The Retirement Plan shall be non-contributory, financed completely by the Company.

"Sec. 2. For the duration of the pension agreement beginning March 1, 1950, the Company agrees to pay into a pension fund $8\frac{3}{4}$ cents for every hour for which an hourly rated employee covered by the contract receives compensation, for the purpose of providing the benefits set forth herein. Since the Company assumes the responsibility to make contributions from time to time to the pension fund in an amount sufficient, based upon estimates made by a duly qualified actuary, to provide the monthly benefits specified in Section 5, taking into consideration as therein provided primary (old age) insurance benefits under the Federal Social Security Act (as now in effect or as hereafter amended), it may vary these payments accordingly. Past service benefits shall be funded in such manner as the Company in its sole discretion shall determine."

That is truly a "company financed" program. The instant case is an "employee financed" program in spite of the cagey language employed. To adopt and accept

this form of "wage increase" is to open the door to abusive negotiations and contracts.

The funds which have been made available to finance this program are *wages* and not company finances. The contract is an effort to circumvent 29 U. S. C. A. 186.

Wages, once granted, cannot be taken from the employee, except under the provisions of 29 U. S. C. A. 186. No wage benefits or allowances are made under the contract involved and then deducted except for health and welfare purposes other than as authorized by 29 U. S. C. A. 186. Collective bargaining cannot be violative of statutory restriction. The increase here is wages deducted from the paycheck of the employee and paid at the direction of the union and employer to an insurance company.

If such is tolerated, what is to prevent the union, through its bargaining committee, to contract with the employer for further deductions of wages granted or to be granted for the "benefit of all of the employees"? A wage increase is never a fiction. It is a reality. Health and welfare programs are desirable, but not to be financed as herein contracted.

To recognize and condone such a contract will open the door to other contracts in other fields to be financed by wages of employees in contravention of 29 U. S. C. A. 186.

It is respectfully submitted that the judgment of the lower court should be reversed and that that portion of the contract governing Health and Welfare be declared to be in violation of 29 U. S. C. A. 186 without the signed authorization of the employees.

Respectfully submitted,

WILLIAM S. HAWKINS,

E. L. MILLER,

Attorneys for Appellants.

No. 13155

In The
United States Court of Appeals
For the Ninth Circuit

R. E. OLSEN, et al., *Appellants*,

vs.

POTLATCH FORESTS, INC., a corporation, et al,
Appellees.

CONSOLIDATED BRIEF OF APPELLEES

Appeal from the United States District Court, for the
District of Idaho, Northern Division.

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FILED

APR 18 1952

PAUL P. O'BRIEN
CLERK

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No. 13155

In the
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R. E. OLSEN, et al., *Appellants*,

vs.

POTLATCH FORESTS, INC., a corporation; JOHN HANCOCK
MUTUAL LIFE INSURANCE COMPANY; INTERNA-
TIONAL WOODWORKERS OF AMERICA, Affiliated With
the Congress of Industrial Organizations, LOCAL No. 10-358,
of the International Woodworkers of America, at Pierce,
Idaho, et al, *Appellees*.

CONSOLIDATED BRIEF OF APPELLEES

Appeal from the United States District Court, for the
District of Idaho, Northern Division.

POINTS RELIED UPON BY APPELLEES

1. The collective bargaining agreement involved
in the present controversy providing for a "wage rate
increase" to pay the cost of a Health and Welfare Pro-

gram was intended to and did create an employer-paid Health and Welfare Group Insurance Plan for the employees without right on the part of any employee to receive the amount of the increase in monetary wages or to control its disposition. (Appellants' Specification of Errors II, III.)

2. Such a Health and Welfare Plan is a proper subject of collective bargaining agreement under the terms of the National Labor Relations Act (29 U.S.C.A. Sec. 159 (a)). The method of financing such a plan, being an integral part of the plan itself, is a proper subject of collective bargaining. The union, as the collective bargaining representative of the employees, had the authority to enter into an agreement with the employer and to bind the individual employees within the bargaining unit irrespective of the wishes of the individual employees (Appellants' Specification of Errors I, IV, VI).

3. The payments to the insurance carrier provided for in the agreement do not violate Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C.A. Sec. 186) (Appellants' Specification of Error V).

ARGUMENT

1. The Agreement Provides for an Employer-Paid Health and Welfare Program.

The argument of counsel for appellants is based upon the major premise that the sum of 7½¢ referred to in subdivision (a) Article XVIII of the collective bargaining¹ agreement is part of the wages or earnings of employees, and that the 7½¢ payments to the insurance carrier or hospital or physicians' organization, referred to in subdivision (c) of the same article, are deductions from these wages or earnings. Proceeding from this premise, counsel then contend that the wages cannot lawfully be withheld from the employee and by the employer paid to the insurance company designated by the union without signed authorization by the individual employees.

Analysis of Article XVIII of the collective bargaining agreement demonstrates that counsel's major premise is false. Wages in the ordinary concept of the term are not involved; rather there is before the court a method of providing a company-financed health and welfare plan, based upon an increase in wage rates. The pertinent language of Article XVIII reads:

“Company Financed Health and Welfare

“(a) A Company paid Health and Welfare program shall be financed as follows: Wage rates will

be increased seven and one-half cents ($7\frac{1}{2}\text{¢}$) per hour, effective June 1, 1950, as to employees on the payroll on the date this agreement is executed, for the purpose of financing and paying for an employee benefit program. * * *

“(b) Each employee included within the bargaining unit under this agreement, upon execution of this agreement in his behalf by the Union as his duly certified collective bargaining agent, hereby authorizes and directs the Company to deduct from his earnings each month the sum of $7\frac{1}{2}\text{¢}$ for each hour worked by him or 60¢ per day for scheduled hourly employees and to pay said sum to such insurance carrier or carriers or hospital or physicians’ organization legally authorized to do business in the state of Idaho as the Union or its authorized representatives may designate to be used exclusively for social benefits to inure to the benefit of the individual employee only. * * * No employee, or former employee, shall have any claim, right, interest in or demand to said $7\frac{1}{2}\text{¢}$ or said 60¢, or any part thereof, or in the provisions of Article XVIII, except he shall receive the social benefits, insurance, medical and surgical coverage, and dividends or refunds as provided under the policy or policies issued by the carrier or carriers as a result of negotiations by the Union with the carrier or carriers. No employee or former employee shall have any right or cause of suit or action and none shall be maintained under the provisions of this working agreement or otherwise against the Company or the Union by reason of the provisions of Article XVIII.

“(c) Effective as soon as permitted by its present policies the Company shall forthwith terminate any existing employee social benefit programs to which the employee contributes. * * *”

Thus, by its very terms, the collective bargaining agreement creates a "Company Financed Health and Welfare" program. It does not provide for any deduction from existing wages to defray the cost of such program. Instead, the agreement in subdivision (a) provides for creation of a fund measured by a "wage rate increase" of $7\frac{1}{2}\text{¢}$ per hour solely to finance the health and welfare plan. This increase in wage rate reflects the amount required to meet the cost of the insurance program. The language of subdivision (b) expressly and completely negatives any right of an employee to receive money as such; his only right is to have this additional $7\frac{1}{2}\text{¢}$ applied exclusively on insurance premiums. Should the agreement fail in its purpose of providing employee social benefits, the employer would be under no obligation to provide $7\frac{1}{2}\text{¢}$ as a wage increase, and the employee would be without recourse to collect such $7\frac{1}{2}\text{¢}$. The "wage rate increase" is one in name only; in substance it is simply the measure to be used by the employer to provide out of its own funds a health and welfare program. The intent is clear that there is no need to obtain individual authorization by employees, and that there is no right of an individual to reject the insurance. Unless, for some reason, this intent is contrary to law, it must be given effect.

Counsel at page 9 of their brief quote from a portion of the Retirement Plan between Ford Motor Co. and the Union, stating that it is truly a “company financed” program. We agree that the language there used established a company financed program; we disagree with counsel’s implication that the persons who drafted this plan had any monopoly on the use of English composition. Doubtless, many company financed programs have been drafted in this country by different persons, no two of the drafts having the same phraseology, yet all may have had the same legal effect. The record is silent as to whether any of the persons who drafted Article XVIII had any familiarity whatever with the phraseology of the Ford plan.

2. The Union and the Employer had Full Power Through Collective Bargaining to Establish the Health and Welfare Program and to Provide for the Earnings’ Deductions and Insurance Payments.

In industries engaged in interstate commerce, the rights and duties of the respective parties in collective bargaining must be determined under the terms of the National Labor Relations Act as amended. The relevant sections of this Act are the following:

“Sec. 9 (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate

for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” (29 U.S.C.A. Sec. 159 (a)).

“Sec. 8 (a) It shall be an unfair labor practice for an employer * * *

“5. to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 (a). (29 U.S.C.A. Sec. 158 (a) (5)).

“Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents * * *

“3. to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a).” (29 U.S.C.A. Sec. 158 (b) (3)).

These provisions firmly establish the principle of majority rule and the principle that the representative selected by the majority of the employees is the exclusive representative of the employees. The Union has the right and the duty to represent all of the employees in the bargaining unit, whether members of the Union or not, and the employer may not make individual arrangements with employees which are inconsistent with the collective bargaining agreement. Individual employees are not free to accept wages or conditions which are inconsistent with the collective bargaining agreement. These principles are announced in *J. I. Case v.*

N.L.R.B., 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 762, where the court held that a collective bargaining agreement invalidated individual contracts of employment which were valid in their terms and inception and entered into prior to the selection of the collective bargaining representative.

On page 3 of appellants' brief, counsel assert that a majority of the individual appellants are not members of the unions or locals herein mentioned. Such indeed is the allegation in appellants' answer filed in the District Court (Tr. of Rec. p. 23), but because no responsive pleading was required to that answer, the averment is taken as denied (Federal Rule 8d). No evidence to support the averment was ever introduced or tendered, and the Stipulation of Facts, on the basis of which the case was submitted, is silent respecting the subject. Hence, it is not established as a fact that a majority of the individual appellants were non-union men. The subject, however, would appear to be unimportant in view of the circumstance that under Sec. 9 (a) of the National Labor Relations Act, the collective bargaining representatives are the exclusive representatives for all employees in the bargaining unit and not merely all members of the Union who are in the bargaining unit. (In the instant case, the appellee unions had been certified by the National Labor Relations Board as the bargaining

agent of the production and maintenance employees of Potlatch Forests, Inc., Tr. of Rec. pp. 5 and 6).

The subject of insurance programs is one which the National Labor Relations Board and courts have expressly held to be a mandatory subject for collective bargaining. *Inland Steel Co. v. N.L.R.B.* 170 F. (2d) 247 (C.A. 7th Circuit, 1948); *Cross & Co. v. N.L.R.B.*, 174 F. (2d) 875, (C.A. 1st Circuit, 1949). It follows that a union has the authority to negotiate for such a plan and to enter into an agreement with the employer to put that plan into effect. It also follows that the method of payment for such a plan, i.e., whether directly by the employer or directly by the employee or by the employer from the employees' money, is a proper subject of collective bargaining.

The union, as the collective bargaining representative, clearly had the power to establish an insurance program or to seek any other improvement in working conditions regardless of whether this might require the use of funds that might be available for a monetary wage increase. In fact, an employer and union may properly negotiate for a change in conditions which adversely affects the established interests of certain of the employees, provided it is done in good faith and not fraudulently. In a number of recent cases it has been held that seniority rights of individual employees are

inferior to and may be altered by a change in the collective bargaining agreement. Thus, in *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 93 L.Ed. 1513, the court held that seniority rights given to a veteran by Sec. 8 of the Selective Training and Service Act of 1940 were not infringed by act of the employer in laying off the veteran prior to laying off union chairmen, although junior to the veteran, where a new collective bargaining agreement made while the veteran was in military service provided that thereafter employees who served as union chairmen were entitled to be retained in case of lay-offs, regardless of their length of service in the plant. See also: *Leeder v. City Service Oil Co.*, 189 P. (2d) 189 (Okla.); *Hartley v. Brotherhood of Ry. & Steamship Clerks*, 283 Mich. 201, 277 N.W. 885; Teller, "Labor Disputes and Collective Bargaining," 1950 Supplement, page 509, Note 13.

If the union may, through collective bargaining with the employer, actually impair valuable seniority rights of individual employees, it would all the more clearly follow that, in a case where the employer has provided a wage increase to pay for a Health and Welfare Program for the employees, the right of the union to impose this plan upon the employees could not be questioned.

It is submitted that the union in the present case had ample authority to bind all individuals in the bargaining unit with respect to the provisions for insurance benefits. This is simply an application of the principle of majority rule. It would be surprising if all employees, whether union or non-union, agreed with all of the terms of the collective bargaining agreement. The application for insurance recites: "Total Number of persons to be covered—48,000, of whom 48,000 are eligible." (Tr. of Rec. p. 144.) In the instant case, 109 out of approximately 3,000 Potlatch employees (3,164 employees in June, 1950), are objecting to the plan (Tr. of Rec. pp. 33, 35, 36). To permit such a small minority of one company's employees to insist upon and seek terms and conditions of employment different from those provided in the collective bargaining agreement would undermine the collective bargaining agreement, and violate the purposes of the Labor Management Relations Act.

3. The Agreement Does Not Violate Section 302 of the National Labor Relations Act.

Counsel for the appellants at pages 8-11 of their brief assert that the earnings' deduction provisions of the collective bargaining agreement are in violation of 29 U.S.C.A. Sec. 186. Little argument is presented in sup-

port of this contention. Nevertheless, to the end that the court may be fully advised, we shall discuss the statute in relation to the facts of the instant case.

Section 186 of Title 29 U.S.C.A. is Sec. 302 NLRA, as amended by LMRA, 1947. Its applicable provisions read:

“(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

“(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

“(c) The provisions of this section shall not be applicable * * * (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents * * * *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pen-

sions on retirement or death of employees, * * * or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; * * *".

It will be noted that subdivision (a) of Sec. 186 above quoted provides that it shall be unlawful for any employer to pay or deliver or agree to pay or deliver any money or other thing of value to any representative of his employees; subdivision (b) of the same section makes it unlawful for any representative of any employees to receive or accept or agree to receive or accept from the employer any money or other thing of value. In the instant case the 7½ cents deduction does not involve any payment by the employer to a representative of his employees; rather the payment is made to the insurance company which, through its group insurance policy, is providing health and welfare benefits for all of the employees. The union does not and cannot receive any of the payments made to the insurance carrier (Tr. of Rec. p. 145).

In *Rice-Stix Drygoods Co. v. St. Louis Labor Health Institute*, 15 Commerce Clearing House Labor Cases, par. 64,727, 22 Labor Relations Reference Manual, (Bureau of National Affairs) 2528, (U.S.D.C., E.D. Mo., 1948), a union and an employer had entered into an agreement after the effective date of the Labor Manage-

ment Relations Act providing in part that the employer would pay to the Institute a sum equal to 3½ percent of the gross pay for all full-time regular employees. The Institute was a corporation organized under Missouri laws relating to benevolent, etc. organizations, engaged in the function of caring for the health of its members who included both union and non-union employees. It was a practice for labor unions to enter into contracts with employers, whereby the latter agreed to pay to the Institute a certain percentage of the wages of the employees in the bargaining unit represented by the union as membership dues. The only interest an employee, employer or labor union had in the Institute was limited to medical and health services. Action was brought by the employer in the above court after an employee had directed the employer to stop making these payments to the Institute and to pay the money to him. The court entered its Conclusions of Law: "That none of the moneys paid to the St. Louis Labor Health Institute are paid to any representative of any employees of any employer as set forth in Section 302 of the Labor Management Act of 1947," and that the payments "are valid and in no way a violation" of that Act.

Moreover, it cannot be successfully contended that since payment to the insurance company in the instant case is on direction of the union, such payment is in fact

a constructive payment to the union of money or a thing of value. Sec. 186 is a criminal statute. It is silent with regard to constructive payments. Statutes creating and defining crimes cannot be extended by intendment. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. 14 Am. Jur. p. 774, Sec. 19.

Sec. 186 was obviously intended to prevent bribery of union representatives and extortion by them, and the placing in their hands of funds which they could use indiscriminately for any purpose they should see fit.

Subsection (c) of Sec. 186 is a statement of certain exceptions to the broad prohibitions set forth in subdivisions (a) and (b). The obvious purpose of subdivision (c) was to make sure that subdivisions (a) and (b) did not prevent the making of certain payments which were thought to be proper. In light of our above comments with respect to the construction of criminal statutes, the conclusion necessarily follows that criminal conduct, outlawed by subsections (a) and (b), cannot be enlarged by implication.

The language of Sec. 186 (c) (5) cannot be said either directly or by implication to prohibit the kind of payments involved here. In the first place, there is no trust fund established by the union in the present case.

The union under the terms of the collective bargaining agreement is in no way entitled to any of the money and in no way acquires any kind of a property interest in it. For the establishment of a trust fund the settlor of the trust must have a transferable interest of title in the corpus of the trust. 54 Am. Jur., "Trusts," Sec. 32, p. 44.

Furthermore, there is nothing in Section 302 (c) (5) which requires health and welfare benefits to be provided solely by means of a trust fund established by the union. There is no suggestion that it is in any way improper for an employer to make contributions to a health and welfare program where the contributions are made to an established insurance company and the program is administered by that company.

There is no requirement that with respect to health and welfare funds the individual employees must consent to deductions being made. It is important to note that clause (5) of subsection (c) dealing with trust funds is in juxtaposition to clause (4) of the same subsection dealing with check-off of union dues, in which case the employer is required to obtain a written assignment from his employees. The absence of such a requirement with respect to money paid into trust funds appears to have been deliberate.

Since, as has been pointed out above, the health and welfare insurance plan for the sole benefit of employees is a proper subject for collective bargaining under 29 U.S.C.A. Sec. 159 (a), it follows that the parties would also be at liberty to bargain with respect to the method of financing the plan—whether payments should be made by the employer solely, or in some other manner as determined by the agreement.

Counsel, at page 8 of their brief, quote from the Majority Report of the Joint Congressional Committee on the Taft Act December 31, 1948, in which it is said: “Sec. 302 (29 U.S.C.A. 186) was written largely to prevent the payment into welfare funds of monies earned by employees, calling for compulsory deductions, the proceeds often completely at the disposition of labor unions.”

It is not clear upon what theory counsel contend that this report, issued a year and a half after passage of Sec. 302 (29 U.S.C.A. 186), can be supposed to control the court in the exercise of its judicial function of construing the applicable statute. (See *Commissioner of Internal Revenue v. Rabenold*, CCA 2nd Cir., 108 F. 2d 639, 641). Counsel do not even contend that the Act is uncertain in its language.

However, the quoted language of the report is consistent with the validity of Article XVIII. As appears from the foregoing analysis of 29 U.S.C.A. 186, the prohibitions of the Act are directed against payments by the employer to representatives of his employees. In the instant case the payments are to an independent, long-established insurance company which, in the course of its business as such, has written a policy of group insurance providing health and welfare benefits for all of the employees.

There are here involved no "proceeds often completely at the disposition of labor unions." The monies remain with the employer until paid over as premiums to the John Hancock Company. Under the agreement, these monies can be used for no purposes other than as premiums to the insurance company and the hospital and physicians' organization. No contention is made that the funds are being used for any purpose other than as provided in Article XVIII.

Finally, it has been abundantly established that the funds involved belong to the employer, not to the employees. Therefore, this is not a case of "the payment into welfare funds of monies earned by employees, calling for compulsory deductions." Counsel for appellants have expressly disavowed any contention that the company employer cannot negotiate with the union for the

purpose of providing out of company funds a health and welfare program (Br. of Appellants, p 7).

CONCLUSION

In two unreported decisions of trial courts involving the identical health and welfare program, certified copies of which are on file with the clerk of this Court of Appeals, contentions of the nature advanced by appellants' counsel herein were overruled. One of these decisions, rendered July 25, 1951, is that of the Honorable Chase A. Clark, District Judge from whom the instant appeal is taken (Appendix A hereto). Judge Clark in part said:

“I cannot agree with the defendant employees that a portion of their wages is being taken away. In the first instance there was a provision for an increase for the specific purpose of financing the employees benefit program. It may be referred to, and probably was, as an increase in wages, however, there was an understanding between the employer and the bargaining agent that the amount of increase in this instance was to finance the said program. The complaining employees have sustained no loss in wages by reason of the contract, on the contrary they have gained all the benefits provided by the Employees Benefit Program. They cannot now say they are entitled to wages in lieu of such benefits.”

The other decision, rendered April 27, 1951, is that of the Honorable John E. Murray, Judge of the Superior Court of Washington for Lewis County, case No. 21149 entitled "Timber Operators Association v. District Council No. 3, International Woodworkers of America, et al" (Appendix B hereto). This decision is of particular significance because although the health and welfare program involved was the same as that in the Potlatch case, the collective bargaining agreement was less explicit in its phraseology than that in the Potlatch case and was far removed in its language from that used in the Ford Employment Plan. Nevertheless, Judge Murray among other things said:

"It is true the item is referred to as wages, and in the broad sense can be so construed. Yet as a part of the collective bargaining agreement it was not intended as an unqualified wage increase separate and apart from the group insurance program. It was not intended that this increase be wages for an employee to draw if he did not want insurance. It was to be used for insurance where there was no employee benefit plan. Where there was an employee benefit plan in effect the employer would receive credit for his contribution thereto and the increase would be the difference. It does not seem to me that this violates Sec. 302 of NLRA as amended by NLMA in 1947."

We respectfully submit that the decree of the trial court herein should be affirmed.

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APPENDIX A

In the United States District Court for the
District of Idaho, Northern Division

POTLATCH FORESTS, INC., *Plaintiff*,

vs.

INTERNATIONAL WOODWORKERS OF AMERICA,
affiliated with the Congress of Industrial Organiza-
tions, et al., *Defendants*.

MEMORANDUM

No. 1808

This matter was submitted to the Court on a stipulation of facts entered into by all the parties who appeared in the action. The stipulation of facts was filed on April 25, 1951, and thereafter briefs were filed and presented to the Court on behalf of all parties in the action.

A study of the stipulation of facts and briefs of respective counsel was made by the Court.

Briefly stated, it appears from the stipulation that the Potlatch Forests, Inc., is a corporation existing under the laws of the State of Maine, and authorized to do business in the State of Idaho, and is engaged in interstate commerce within the meaning of the National Labor Relations Act. That the International Woodworkers of America and its affiliated locals have been desig-

nated and certified by the National Labor Relations Board as the sole and exclusive bargaining agent of the production and maintenance employees of the Potlatch Forests, Inc. It appears that a certain collective bargaining agreement was entered into between the plaintiff and the defendant Union covering all of the production and maintenance employees of the plaintiff. Among other things the agreement provided for a certain increase in wage rates for the purpose of financing and paying for an employees benefit program. Thereafter the plaintiff deducted from each and every maintenance and production worker certain amounts to pay for the above mentioned benefit program. The Union as bargaining agent entered into a contract with the John Hancock Mutual Life Insurance Company for group insurance covering said employees and thereafter under the instructions of said Union, the plaintiff paid out certain moneys to certain physicians and to the said Insurance Company according to the terms of the said benefit program.

On or about the 6th day of September, 1950, plaintiff was served with a demand signed by 109 of its employees, defendants herein, requesting that no further deductions be made from their earnings for the health and welfare program and that said sums heretofore deducted be returned to them immediately.

The plaintiff filed a complaint for a declaratory judgment.

It appears to the Court under the National Labor Relations Act, that the plaintiff as an employer is required to bargain with the Union designated as the bargaining agent, with respect to rates of pay, wages, hours of employment and other conditions, which conditions include a company financed health and welfare program.

From a study of the Act involved and the numerous cases involving this and like questions, it appears to the Court that the Union, once selected as the bargaining agent, has the authority under the act to enter into trade agreements setting up benefits such as group insurance, such agreement may provide for the deductions necessary to finance such benefits. I cannot agree with the defendant employees that a portion of their wages is being taken away. In the first instance there was a provision for an increase for the specific purpose of financing the employees benefit program. It may be referred to, and probably was, as an increase in wages, however, there was an understanding between the employer and the bargaining agent that the amount of increase in this instance was to finance the said program. The complaining employees have sustained no loss in wages by reason of the contract, on the contrary they have gained

all the benefits provided by the Employees Benefit Program. They cannot now say they are entitled to wages in lieu of such benefits.

The Court is of the opinion that the request of the plaintiff for declaratory judgment as contained in its complaint should be granted and counsel for the plaintiff is directed to prepare the necessary findings of fact, conclusions of law and judgment, serve copy on opposing counsel and submit the original to the Court for its consideration. Dated July 25, 1951.

APPENDIX B

In the Superior Court of the State of Washington
for Lewis County.

TIMBER OPERATORS ASSOCIATION, a non profit corporation, *Plaintiff*,

vs.

DISTRICT COUNCIL NO. 3, INTERNATIONAL WOODWORKERS OF AMERICA; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-2; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-30; DISTRICT COUNCIL NO. 2, INTERNATIONAL WOODWORKERS OF AMERICA; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 2-90; WILLIAM CRAWFORD, CLAUDE BURGESS, J. B. RUSSELL, KARLY LARSON and

A. M. KELLY, REX McCARTY and DONALD RAND, *Defendants*.

MEMORANDUM OPINION

No. 21149

This is an action in equity brought under the Declaratory Judgment Act by the Timber Operators Association, an association of employers engaged in logging in Southwestern Washington, against labor unions which represented employees in collective bargaining and certain officers of the unions.

The issues are presented upon a complaint, answer and cross-complaint, and reply, together with a stipulation entered into by the parties and signed by the Court as a pre-trial order, together with some oral testimony covering several matters not admitted in the pleadings or pre-trial order. The pre-trial order was made upon the understanding that any of the parties to the action could object to the materiality and relevancy of any matters therein stated.

The plaintiff moved to strike from the pre-trial order the following paragraphs or subdivisions: From paragraph VII, subdivisions 4 to 21, inclusive, beginning on page 5 and continuing to the end of paragraph VII, on page 9. Plaintiff also objects to paragraphs VIII, IX, X,

X-a, XI, XII, XIII, XIV, XVI, and XVII. The objections made by the plaintiff are to relevancy and materiality.

There seems to be no question about the happening of the events or the correctness of the facts set forth in those paragraphs. Plaintiff claims they are irrelevant and immaterial because the contract in issue is clear and not ambiguous; that those paragraphs set forth the circumstances under which the contract was arrived at and cover mostly negotiations with groups other than the plaintiff; that they constitute only background and preliminary negotiations which were all merged into subsequent contract.

Respective counsel for plaintiff and defendants agree that the contract is clear and unambiguous, yet reach opposite conclusions as to its meaning.

Taking the contract as a whole, rather than a group of isolated and independent paragraphs, it furnishes a basis, apparently, for arriving at different conclusions. It is capable of being understood in two possible senses, and therefore ambiguous.⁴ On the other hand, even if not ambiguous, as both sides contend, it seems to me the circumstances and negotiations leading to the final agreement in this case will assist the Court by placing it in the situation of the parties. The Court can then view the transactions as the parties did and be able to

determine the correct interpretation of the language used and the matters really agreed upon.

The motion to strike should be overruled.

STATEMENT

The plaintiff seeks a declaratory judgment and injunction. The purpose is to prevent the enforcement against plaintiff and its members and other employers in the State of Washington of a provision in the collective bargaining agreements between the employers and the defendant unions and others.

The defendant International Woodworkers of America (IWA) charters local unions and district councils composed of local unions within geographic areas. The local unions chartered by the IWA are located throughout the states of Washington, Oregon, Northern California and Northern Idaho. Workers who are members of these local unions are employees engaged in the logging and lumbering industry and plywood manufacturing.

The complaint is stated in two counts. One relating to the collective bargaining agreement between plaintiff, acting for certain of its members, and defendant District Council No. 3 of the IWA, acting for defendant Local Unions 3-2 and 3-20; the other relating to collec-

tive bargaining agreement between plaintiff and defendant Local Union 2-90. The provision or clause involved in each count is identical and the same issue is presented for determination, and I believe both causes of action can be treated as one.

At a conference of representatives of various local unions situated throughout the Northwest, the decision to demand an employer paid health and welfare program was reached. Thereafter notices were given to the various employers requesting amendment and revision of the union working agreement. The unions, through their respective district councils, authorized a committee of the international union, commonly known as the Northwest Regional Negotiating Committee, to represent the various local unions in negotiations with the employers engaged in the logging and lumbering industry.

During the month of January 1950, District Council No. 3 IWA and Local Union 2-90 notified the plaintiff of a desire to make revisions and amendments to the working agreement then in existence, in the following particulars, as shown by Exhibit "C" to the pre-trial order, which, in so far as pertinent here, may be summarized as follows:

HEALTH AND WELFARE

Employer—aid health and welfare program covering:

1. \$3,000 life insurance plus \$3,000 for dismemberment and/or accidental death.
2. Full hospital, medical and surgical coverage.
3. \$40.00 a week benefits for 26 weeks for sickness and injuries off the job. Payments to begin with the 4th day resulting from sickness and with the first day resulting from injury.
4. While a worker is drawing workmen's compensation he shall be paid a sum equivalent to the difference between Workmen's Compensation and \$40.00 per week.

The notice also made reference to paid holidays, but those matters are not in dispute.

The employers whose employees are members of and represented by the various IWA local unions met with the union committee, through various employer associations, in Portland, Oregon, to carry on negotiations involving the proposed contract revisions and changes. The conferences or discussions between committees of employers and of unions had no authority to bind, but could only make recommendations to their respective principals for consideration and approval or rejection.

Negotiations began in February 1950 and continued until April 1, 1950, at which time the employers refused to grant an employer paid health and welfare program and the union committee decided to take a strike vote. This vote was taken and strike deadline fixed for May 15, 1950.

On May 11th and 12th the union committee and committees of employers of Willamette Valley Lumber Operators Association (WVLOA) agreed upon a joint recommendation. Also at about the same time the union committee and Lumbermens Industrial Relations Committee (LIRC) agreed upon a joint recommendation which included the following provision as a part of paragraph 2:

“If the foregoing is found to be in conflict with any federal or state law, the parties agree to amend it so as to conform to the same.”

This provision was also added to the settlement reached with the WVLOA.

On May 13th the plaintiff met with the union committee in Portland, at which time they likewise agreed upon the same joint recommendation as agreed to by WVLOA and LIRC. The joint recommendation (Ex. “B” to complaint) is as follows, in so far as important in this case:

“To settle all issues before them for negotiations, the Northwest Regional Negotiating Committee, I.W.A. and Timber Operators Association recommend for acceptance to the Local Union and the Company or Companies respectively represented by each, the following:

“1. All employees covered by this agreement shall receive a wage increase of $7\frac{1}{2}\phi$ per hour effective May 1, 1950, and the wage scale shall be revised accordingly.

“2. There shall be included in each working agreement where there is no existing employer benefit plan in effect between the Local Union and Employer, the following clause:

“ ‘Upon execution of this agreement in his behalf by Union, each employee covered by this agreement authorizes and directs Employer to deduct from his earnings each month the sum of not more than $7\frac{1}{2}\phi$ for each hour worked by him and pay said sum to such insurance carrier or carriers as the Union or its authorized representative may designate for employee social benefits. Such sum shall be paid on the statement of the insurance carrier or carriers so designated. Employer will cooperate with the insurance carriers in securing necessary information for coverage.’

“If the foregoing is found to be in conflict with any federal or state law, the parties agree to amend it so as to conform to the same.

“3. Where an employee benefit program is now in effect in an operation, Employer shall receive credit for his contribution to such program, and said program may be supplemented to the extent set forth in the above.

“4. * * * * *

“5. Employee social benefit issues shall be closed until April 1, 1952.”

The plaintiff by letter of June 22nd indicated that the joint recommendation was accepted, but insisted, however, that before the employers could lawfully make the deductions there must be a written authorization from each employee. (Ex. “C” to complaint)

July 27th defendant District No. 3, representing Local 3-2 and Local 3-30, reported to plaintiff that the recommendations of May 13th had been accepted by the membership and the unions involved. On July 13th Local Union 2-90 also informed plaintiff of acceptance of the May 13th recommendation.

The International Woodworkers of America-CIO on July 1, 1950, entered into a group insurance contract with the John Hancock Mutual Life Insurance Company covering all employees within the bargaining units represented by the defendants herein and other local unions chartered by the said International Woodworkers of America, said group insurance being for life, accident and health insurance.

The defendants assert that since the trial of this action the basic group insurance policy has been

changed. At the time of the trial it contained the following provision:

“Annual Surplus Distribution. On each policy anniversary to which premiums have been paid, there shall be distributed hereon such share of a divisible surplus as may be apportioned hereto by the company. Any such divisible surplus shall be paid in cash to the union or at the election of the union may be applied in abatement of premium payments.”

On February 3, 1951, International Woodworkers of America-CIO executed and forwarded to John Hancock Mutual Life Insurance Company an instrument that irrevocably assigned all of the interest in any dividends due or payable under the group policy or otherwise, including specifically any divisible surplus referred to in the above quoted paragraph, to the insurance company. It also directed the insurance company to credit such dividends to the gross advance premium account, for application in accordance with the special administrative provisions of the policy pertaining to moneys credited to said gross advance premium account. For the purpose of this decision it will be assumed that such change has been made.

The principal issues appear to be:

1. What is the meaning of the contract of May 13, 1950?

2. Does collective bargaining authority include right to obtain an increase in wages and direct the application thereof to pay for group insurance for employees?

3. Would employer be guilty of violating the rebate statutes (R.R.S. 7612-21 to 7612-25) in making the deductions agreed upon without individual written consent of employees?

4. Did the union as bargaining agent exceed its authority?

5. Does the NLRA violate the constitution in that it permits the taking of employees' property without due process of law?

1. What is the meaning of the contract? The plaintiff and defendants, previous to the contract here involved, had working agreements covering wages, hours, holidays and other details. (Ex. "A" to complaint.) The defendants sought a revision and amendment of the working agreements to include "Employer paid Health and Welfare Provision." The committees negotiated for several months on the question. The unions showed that the proposed health and welfare insurance program would cost \$12.41 per month per man, or 7½¢ to 8½¢

per hour (p-t.o., p. 6). The employers refused to comply with the union demands, but made a number of counter proposals for employer paid group insurance (p-t.o., p. 7). The counter proposals of the employers were rejected because the unions insisted that the benefits were not adequate. Finally, the employers agreed to raise the wages $7\frac{1}{2}\text{¢}$ per hour per man and pay it to an insurance carrier or carriers authorized or designated by the unions. On May 12, 1950, the union arrived at a settlement with the WVLOA and the LIRC. On May 13th the plaintiff and the union committee also made a settlement in the nature of a joint recommendation, which, by approval of the interested parties, became the contract here involved (p-t.o., Ex. 1).

It clearly appears that the unions were negotiating for an employer paid health and welfare program; that the employers made counter proposals of employer paid insurance, which were rejected. Finally, whether or avoid the work and responsibility of administering the insurance program or because they believed the plan unworkable or illegal or prohibitive in cost, the employers rejected the union proposal and agreed to the joint recommendation hereinabove set forth.

Upon considering the entire joint recommendation or contract, it seems to me the parties agreed upon a settlement of all issues before them by a wage increase

to pay for an employee benefit group insurance program.

2. Does collective bargaining authority include right to obtain increase in wages and direct the application thereof to pay for employee group insurance?

The parties agree that under the National Labor Relations Act and National Labor Management Act the unions here are the exclusive bargaining agents of their respective units "in respect to rates of pay, wages, hours of employment or other conditions of employment* * *." 29 U.S.C.A. 159 (a).

The parties also agree that bargaining in respect to group insurance is mandatory and comes within the "wages," "rates of pay" and "other conditions of employment."

It also seems to be agreed that an employer paid group insurance plan would be legal in every respect.

The remaining question, the one stated at the head of this discussion, is the one in dispute. The plaintiff insists that the payment is from wages of employees and unlawful. The defendants argue that the program is really an employer paid one.

29 U.S.C.A. 186 (Sec. 302 NLRA as amended by NLMA 1947) makes it unlawful for an employer to pay

or deliver anything of value to a union, and likewise makes it unlawful for the union to agree to accept anything of value.

“(c) The provisions of this section shall not be applicable

“(4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment * * *,” or

“(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer and their families and dependents * * *: Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees * * *, or unemployment benefits or life insurance disability and sickness insurance, or accident insurance.”

There is nothing in this act which indicates that congress had any objection to an insurance plan paid from funds wholly contributed by the employer. There is nothing in the act indicating that deductions from employees' wages for the purpose of paying insurance are prohibited. This section does limit the type of de-

ductions for union dues and it also limits the type of trust fund that may be established for benefit of employees, but says nothing limiting the type of deductions that could be made in setting up a group insurance plan for the sole benefit of employees. Since such a plan is a proper subject for collective bargaining, surely it would permit bargaining to finance the same, whether it be paid by the employers solely or whether it be paid under an agreement providing for a wage increase to take care of it. This latter plan may be difficult to distinguish from an employer paid group insurance program, particularly where the agreement provides for the increase in pay and a corresponding deduction to take care of it where there is no existing employee benefit insurance plan. It is true the item is referred to as wages, and in the broad sense can be so construed. Yet as a part of the collective bargaining agreement it was not intended as an unqualified wage increase separate and apart from the group insurance program. It was not intended that this increase be wages for an employee to draw if he did not want insurance. It was to be used for insurance where there was no employee benefit plan. Where there was an employee benefit plan in effect the employer would receive credit for his contribution thereto and the increase would be the difference. It does not seem to me that this violates Sec. 302 of NLRA as amended by NLMA in 1947.

The plaintiff contends that the union is interested because under the terms of the group policy with the John Hancock Mutual Life Insurance Company, (Defendants' Ex. "C") Section T General Provisions at page T-14 provides in paragraph 8 that any divisible surplus on the policy shall on each policy anniversary be paid in cash to the union, or at the election of the union may be applied in abatement of premium payments. As heretofore stated, this objection is not being considered because since the case has been heard, so defendants' brief recites, the union has irrevocably assigned all its rights to dividends or divisible surplus to the insurance company, with the direction that such amounts be credited to gross advance premium account. While I appreciate this had not been done at the time of trial, if there is any question about the interest of the union in such "annual surplus distribution" I will hear further evidence in that regard. If the union receives benefits from the insurance contract it would amount to a violation of Sec. 302 of NLMA as amended in 1947.

3. Would employer be guilty of violating the rebate statutes (R.R.S. 7612-21 to 7612-25) in making the deductions agreed upon without individual written consent?

The above sections of the statute deal with rebates and make it a misdemeanor for a violation thereof. A

criminal statute must be strictly construed and nothing can be added thereto by intendment or construction.

State v. Youngbluth, 60 Wash. 383; 11 Pac. 240.

Huntworth v. Taylor, 87 Wash. 670; 152 Pac. 543.

State v. Yelle, 4 Wash. 2d 327; 103 Pac. 2d 372.

R.R.S. 7612-21 provides substantially as follows:

That it is unlawful for any employer (1) to receive a rebate from any employee of any portion of his wages; (2) to wilfully deprive the employee of any part of his wages by paying him a lower sum than agreed upon; (3) to make false entries in employer's books regarding the wages; (4) for an employer or one keeping employer's books to wilfully fail to show openly and clearly any rebate or deduction that may be made from employee's wages; (5) shall wilfully receive or accept from any employee any false receipt for wages. A violation of any of these provisions is a misdemeanor.

In applying the facts of this case to the above section there is certainly no indication that the employer received any benefit by reason of the deductions, nor is it contemplated that any false entry or record be made or that any false receipt be taken from the workman. The deductions are to be made openly, under a collective bargaining agreement to do so, and to be paid to an insurance company solely for the benefit of the employee.

R.R.S. 7612-22 provides substantially that it shall not be unlawful for an employer to withhold a portion of the employee's wages when required or authorized to do so by state or federal law, or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee, nor shall it be unlawful for an employer to withhold deductions for medical, surgical or hospital care pursuant to any rule or regulation. "Provided, That the employer derives no financial benefit from such deduction and the same is openly, clearly and in due course recorded in the employer's books."

R.R.S. 7612-21 does not in any way prohibit a deduction under a collective bargaining agreement to pay for insurance for the employee. And the provision of 7612-22 which enumerates certain things for which the employer may lawfully make deductions does not necessarily prohibit others. This being a criminal statute, it must be strictly construed, and since there is nothing in 7612-21 to prohibit the deduction for employee's benefit for insurance, certainly the failure to list that as a lawful deduction in the next section could not by inference or by construction make it a crime.

Under the collective bargaining agreement the employee receives all that was agreed upon, the employer

receives no rebate in making the deduction and there is no wilfulness or wrong in making the deduction and paying it for the purposes agreed upon.

4 and 5. Plaintiff further insists that the union exceeded its authority as a bargaining agent in that it could not enter into an agreement whereby a portion of the employee's pay was to be used for insurance and, further, that a law authorizing such an agreement would be unconstitutional in that it takes the property of the employee without due process of law.

The conclusions hereinabove reached make it unnecessary to discuss extensively these two propositions. The union, as a collective bargaining agent, had authority to deal with employer in obtaining group insurance; also, in so doing it was clearly within such authority to enter into a trade agreement for an increase in pay to take care of the insurance and direct the application or deduction of such amount of the increase as may be proper to pay the cost thereof.

It seems to me that under the collective bargaining authority the unions and employers can make a trade agreement setting up a plan for group insurance and providing the payment thereof by an increase in the wage scale and in the same agreement authorize deductions. Nothing is being taken from the workman. On the other hand, the bargaining agent has obtained from

the employer an increase for a particular purpose and directs the application of a portion thereof to the payment of insurance. The increase in pay and the group insurance all refer to and are included within the term "wages or other conditions of employment." For those who are not yet in the employ the trade agreement stands as a schedule of basic rights, and upon the individual employment agreement being made he is covered by it. As to the one who was employed at the time, nothing has been taken away. He has been benefited by the addition of group insurance and a corresponding increase for the purpose of paying therefor.

This memorandum has already grown to unusual length and the cases cited in the briefs have not been discussed, but I believe that sufficient recitals and statements have been made to show the basis upon which my conclusions are founded.

Finally, it is my conclusion that the bargaining agreement is a valid one and constitutes what may be called a working agreement or trade agreement; that any person then an employee or later becoming an employee is bound thereby, and the employer under such bargaining agreement has authority to deduct such amount as may be necessary to pay for the group insurance, but not to exceed $7\frac{1}{2}\text{¢}$ per hour per man, and forward the same to the insurance company. It is further

my conclusion that in doing so the employer does not in any way violate either federal or state law, nor do the employees. Further, it is my conclusion that the union as bargaining agent had authority to enter into the agreement; that the agreement does not in any way violate the constitutional rights of the employee.

The insurance became effective as of July 1, 1950. It seems to me no deductions could be properly made before the date upon which the policy became effective.

The prayer of the plaintiff's complaint should be denied and a decree should be entered herein in accordance with the prayer of the defendants' answer.

Dated April 27th, 1951.

JOHN E. MURRAY,
Judge.

(No appeal was taken from the decree of Judge Murray entered pursuant to the above decision.)

No. 13156

United States
Court of Appeals
for the Ninth Circuit

STERLING CARR, Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt,
Appellant,

vs.

THE YOKOHAMA SPECIE BANK, LTD., OF
SAN FRANCISCO, a foreign corporation, and
MAURICE C. SPARLING, as Superintendent
of Banks of the State of California and Liquidator of the Yokohama Specie Bank, Ltd., San Francisco Office, *J. HOWARD DEGRAT*
Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

FILED

FEB 12 1952

United States
Court of Appeals
for the Ninth Circuit

STERLING CARR, Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt,
Appellant,
vs.

THE YOKOHAMA SPECIE BANK, LTD., OF
SAN FRANCISCO, a foreign corporation, and
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of Banks of the State of California and Liquidator of the Yokohama Specie Bank, Ltd., San Francisco Office,
Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the
Northern District of California, in
the Southern Division

No. 22509-S

STERLING CARR, Trustee of the Estate of Nip-
pon Yusen Kaisya, a corporation, Bankrupt
Plaintiff,

vs.

THE YOKOHAMA SPECIE BANK, LTD., of
San Francisco, a foreign corporation, GEORGE
J. KNOX, Superintendent of Banks of the
State of California and Conservator of the
Yokohama Specie Bank, Ltd., YOSHIO MU-
TO, Consul General of Japan at San Francisco,
LEO T. CROWLEY, Alien Property Custod-
ian, JOHN DOE ONE, JOHN DOE TWO,
and JOHN DOE COMPANY, a corporation
Defendants.

COMPLAINT TO QUIET TITLE

To the sum of \$66,892.65 standing in the
name of Yoshio Muto, as Consul General of
Japan at San Francisco, in a special ac-
count with the Yokohama Specie Bank,
Ltd.

The complaint of Sterling Carr, Trustee of the
estate of Nippon Yusen Kaisya, bankrupt, alleges:

I.

That on the 23rd day of April, 1942, the above-
named bankrupt, Nippon Yusen Kaisya, was adju-

icated a bankrupt, and thereafter on July 3, 1942, by proceedings duly had, Sterling Carr was appointed Trustee of the said estate.

II.

That at all times previous to October, 1940, the Yokohama Specie Bank was a foreign banking corporation authorized to engage in, and engaged in the banking business in the State of California; that ever since the month of July, 1941, any and all of the transactions of said Nippon Yusen Kaisya have been classified as "Blocked" by the Treasury Department of the United States.

III.

That George J. Knox has been at all the times herein mentioned, and now is the duly authorized and appointed Superintendent of Banks for the State of California; that on or about December 7, 1941, said George J. Knox, as Superintendent of Banks, did take possession of the assets of said Yokohama Specie Bank in the State of California and ever since has been and now is the Conservator thereof.

IV.

That at all times herein mentioned, up to December 7, 1941, Yoshio Muto was Consul General for Japan, at San Francisco, California, with offices in said city.

V.

That Leo T. Crowley is the duly appointed and acting Alien Property Custodian of the United States of America.

VI.

That the true names of the defendants sued herein as John Doe One, John Doe Two, and John Doe Company, a corporation, are unknown to the plaintiff, and plaintiff prays that when their true names are ascertained the same may be inscribed herein with apt and proper words to charge them.

VII.

That for some years previous to, and during the months of October and November, 1941, Nippon Yusen Kaisya, the bankrupt herein, was engaged in the steamship business, conducting a passenger and freight service between the points of San Francisco and the Far East. That one of the vessels belonging to Nippon Yusen Kaisya was the Tatuta Maru, which had left Yokohama, Japan, on or about October 15, 1941, and was due to arrive at San Francisco on or about the 25th day of October, 1941.

VIII.

That ever since the month of July, 1941, by virtue of a Proclamation of the President of the United States, any and all business of Japanese aliens was ordered "Blocked", and any and all transactions of said Japanese aliens thereafter could only be performed after such aliens had obtained a license from the Federal Reserve Bank of this district, to carry on such transactions.

IX.

That during the month of September, 1941, upon the arrival of one of the ships of the said Nippon Yusen Kaisya, bankrupt, the said vessel was libelled

by numerous American creditors, and which libels resulted in various difficulties in securing the release of said vessel upon its sailing date, necessitating the filing of bonds by said Nippon Yusen Kaisya, and ultimately, the discharge of its cargo.

X.

Plaintiff believes and alleges that the said bankrupt, anticipating a like experience upon the arrival of its steamship Tatuta Maru, and to avoid like difficulties to those referred to above, entered into a plan and conspiracy with the Consul General of Japan at San Francisco and the said Yokohama Specie Bank, Ltd., of San Francisco, whereby it was agreed to have the said Tatuta Maru declared as requisitioned by the Japanese Government and thereby secure permission from the United States Government to permit said vessel to arrive at and depart from the Port of San Francisco upon business of the Japanese Government.

XI.

In the furtherance and performance of said conspiracy, it was agreed between said parties thereto that any and all proceeds which were to be received from said voyage of said vessel should be deposited in the name of the Consul General of Japan at San Francisco, said Yoshio Muto, in said Yokohama Specie Bank, Ltd. of San Francisco, there to be held in a secret trust for said bankrupt, and that any and all expenditures in connection with said vessel or its said voyage were to be disbursed by said Japanese Consul General pursuant to instruc-

tions of said bankrupt, and that any balance remaining after all of said expenses were paid were to be withdrawn by said Consul General of Japan at San Francisco and paid to said Nippon Yusen Kaisya in Japan.

XII.

That in furtherance of said conspiracy, said Nippon Yusen Kaisya, with the knowledge and consent of said Yokohama Specie Bank, Ltd. of San Francisco, did open an account in the Yokohama Specie Bank, Ltd. of San Francisco, for said Consul General of Japan, said Yoshio Muto, and did advance to the said account of said Consul General of Japan, said Yoshio Muto, the sum of \$39,000. That thereafter, pursuant to said conspiracy, said Nippon Yusen Kaisya proceeded to sell passenger tickets and deposited the proceeds therefrom all with the knowledge and consent of the Yokohama Specie Bank, Ltd. of San Francisco as to the true facts and purposes of said deposits, in and to the account of said Consul General of Japan, said Yoshio Muto, at said Yokohama Specie Bank, Ltd. of San Francisco.

XIII.

That the actual total amount so collected from said proceeds of passenger and baggage service under said plan and conspiracy amounted to \$65,-652.18; that thereafter, and pursuant to instructions from said Nippon Yusen Kaisya, and in furtherance of said conspiracy, said Consul General of Japan, said Yoshio Muto, did disburse certain sums of money as expenses of said vessel, leaving a bal-

ance in said account to the credit of said Consul General of Japan, said Yoshio Muto, in the sum of \$66,892.65, and which amount is now on deposit with said Yokohama Specie Bank, Ltd. of San Francisco, and under the control and domination of said George J. Knox as such Conservator. Plaintiff alleges that in truth and fact, all of said sum of \$66,892.65, and any and all claims to the collection thereof from the said Yokohama Specie Bank, Ltd. of San Francisco, are the property and assets of said Nippon Yusen Kaisya, bankrupt herein.

IXX.

That Leo T. Crowley, Alien Property Custodian, by virtue of Vesting Order No. 256, issued October 27, 1942, did vest all of the right, title, interest and claim of said Yoshio Muto, Consul General of Japan, in and to the indebtedness owing to the said Yoshio Muto by the said Yokohama Specie Bank, Ltd. of San Francisco and standing in the account of Yoshio Muto, Consul General of Japan Special Account, which account has a balance in the sum of \$66,892.65; that plaintiff is informed and believes that said Leo T. Crowley, Alien Property Custodian, claims some right, title and interest in and to the funds standing in the name of said Yoshio Muto, Consul General of Japan at San Francisco, which funds, plaintiff alleges, are the funds of Nippon Yusen Kaisya, bankrupt; and any and all claims or rights of the said Leo T. Crowley, Alien Property Custodian, in or to said funds are subject to the rights of the Trustee of Nippon Yusen Kaisya, bankrupt.

XX.

That plaintiff is informed and believes that defendants John Doe One, John Doe Two and John Doe Company, a corporation, claim some right, title and interest in and to the funds standing in the name of said Yoshio Muto, Consul General of Japan at San Francisco, which funds, plaintiff alleges, are the funds of Nippon Yusen Kaisya, bankrupt; and any and all claims or rights of the said defendants John Doe One, John Doe Two and John Doe Company, a corporation, in or to said funds are subject to the rights of the Trustee of Nippon Yusen Kaisya, bankrupt.

XXI.

Plaintiff alleges that the said sum of \$66,892.65 standing in the name of said Yoshio Muto, Consul General at San Francisco, is held in trust by the said Yoshio Muto for and on behalf of the Nippon Yusen Kaisya, bankrupt herein, and as such the plaintiff, as Trustee of the estate of said bankrupt, and the creditors of said estate, are entitled thereto; that demand has been made upon the said George J. Knox, Superintendent of Banks of the State of California, by plaintiff to have the said account transferred from the name of said Yoshio Muto to plaintiff as such Trustee, and in the event of any dividends being paid on the account by the Yokohama Specie Bank, in the course of liquidation or otherwise, that all such funds be turned over and delivered to plaintiff as Trustee of Nippon Yusen Kaisya, bankrupt, instead of said Yoshio Muto or the Alien Property Custodian; that the said George

J. Knox has refused, and still refuses to comply with said demand.

XXII.

The Yokohama Specie Bank, Ltd. at San Francisco, claims some right, title and interest in and to the said sum of money, all of which right, title and interest is subject to the right, title and interest of the Trustee for the estate of the bankrupt.

Wherefore, your petitioner prays that:

1. The Court decree that the funds standing in the name of said Yoshio Muto, Consul General of Japan at San Francisco, Special Account, in the Yokohama Specie Bank at San Francisco, be declared the property of said Nippon Yusen Kaisya, bankrupt;

2. George J. Knox, Superintendent of Banks of the State of California, be directed to transfer said sum standing in the name of Yoshio Muto, Consul General of Japan at San Francisco, Special Account, in the Yokohama Specie Bank at San Francisco, into the name of Sterling Carr as Trustee of the estate of said Nippon Yusen Kaisya, bankrupt;

3. Said George J. Knox, Superintendent of Banks of the State of California, be ordered to deliver, turn over and remit to Sterling Carr as Trustee of said bankrupt, any and all remittances, liquidating dividends or disbursements that may be made by said George J. Knox as Conservator of the Yokohama Specie Bank, on said account;

4. That the Court declare that the money standing in the name of Yoshio Muto, Consul General of Japan at San Francisco, Special Account, in the

Yokohama Specie Bank, Ltd. of San Francisco, is the property of the Trustee of said bankrupt, and that Leo T. Crowley, Alien Property Custodian, John Doe One, John Doe Two and John Doe Company, a corporation, have no right, title or interest in said money; and

5. For such further order as the Court may deem meet and proper in the premises.

/s/ STERLING CARR,
Plaintiff.

Duly verified.

[Endorsed]: Filed March 2, 1943.

[Title of District Court and Cause.]

ANSWER OF THE YOKOHAMA SPECIE
BANK, LTD.,

of San Francisco, a foreign corporation,
and Benjamin C. Corlett, substituted defendant, as Superintendent of Banks of the State of California and Conservator of The Yokohama Specie Bank, Ltd., Defendants.

Comes now the defendant, The Yokohama Specie Bank, Ltd., and Benjamin C. Corlett, as Superintendent of Banks of the State of California and Conservator of The Yokohama Specie Bank, Ltd., a foreign corporation, substituted defendant, in the place and stead of George J. Knox, formerly Superintendent of Banks of said State of California and Conservator of said The Yokohama Specie

Bank, Ltd., and answering the complaint of plaintiff herein, admit, deny and allege as follows:

I.

Allege that by virtue of an order duly made and entered in the above entitled court on the 8th day of May, 1943, defendant, Benjamin C. Corlett as Superintendent of Banks of the State of California and Conservator of The Yokohama Specie Bank, Limited, of San Francisco, one of the defendants named in the within action, was substituted as a defendant herein in the place and stead of George J. Knox, formerly Superintendent of Banks of said state and Conservator of said bank.

II.

Answering Paragraph III of plaintiff's complaint said defendants deny that at the time of the filing of said complaint George J. Knox was the duly authorized and appointed Superintendent of Banks for the State of California, but admit that at all times in said complaint mentioned prior to the 1st day of March, 1943, said George J. Knox had been, from the 29th day of May, 1940, to the said 1st day of March, 1943, the duly authorized and appointed Superintendent of Banks for said State; and admit that as such Superintendent of Banks for said state, said George J. Knox did take possession of the assets of said The Yokohama Specie Bank in the State of California on or about the 7th day of December, 1941, to-wit the 8th day of December, 1941; and in connection therewith said defendant Ben-

jamin C. Corlett alleges that on the 1st day of March, 1943, at or about the hour of 9 o'clock in the forenoon of said day, he, the said Benjamin C. Corlett, was duly appointed as Superintendent of Banks of the State of California, in the place and stead of said George J. Knox, and that ever since said 1st day of March, 1943, he has been and now is, and at the time of the commencement of the within action was, the duly appointed, qualified and acting Superintendent of Banks of the State of California.

And, further answering said paragraph III of plaintiff's complaint, the said Benjamin C. Corlett alleges that on or about the 12th day of January, 1942, the aforesaid George J. Knox assumed the rights, powers, duties and privileges of Conservator of the aforesaid bank and its banking business, under and by virtue of the powers conferred upon him as Superintendent of Banks of the State of California, and as such conservator took and retained possession of its said banking business and of the assets thereof from the aforesaid 12th day of January, 1942, to and including the aforesaid 1st day of March, 1943, at or about the hour of 9 o'clock in the forenoon of said day;

That immediately upon his appointment and qualification as Superintendent of Banks of the State of California, on the aforesaid 1st day of March, 1943, said Benjamin C. Corlett, as such Superintendent of Banks of the State of California, under and by virtue of the provisions of the Banking Law of said state, assumed the rights, powers,

duties and privileges of Conservator of the said The Yokohama Specie Bank, Limited, San Francisco, in the place and stead of the aforesaid George J. Knox, and ever since has been and now is the duly appointed, qualified and acting Conservator of said bank and in possession of the business and assets of said bank as such Conservator.

III.

Said defendant admits the allegations contained in paragraphs I, II, IV, V, VI and VIII of said complaint.

IV.

Said defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VII and IX of the complaint, hence basing his denial upon that ground, he denies generally and specifically, each and every, all and singular the allegations in said paragraphs contained.

V.

Denies generally and specifically, each and every, all and singular the allegations contained in paragraphs X and XI of said complaint.

VI.

Answering Paragraph XII of said complaint, said defendant Benjamin C. Corlett, as Conservator of said defendant bank, denies, generally and particularly that in furtherance of any conspiracy, or plan, the said Nippon Yusen Kaisya did open an account in the said The Yokohama Specie Bank,

Limited, San Francisco Office, for the said Consul General of Japan, said Yoshio Muto, as alleged in said paragraph, or in any other manner or at all; but in this connection the defendant alleges that it is true that said bankrupt was at all times mentioned in said complaint one of the regular depositors of said defendant bank, having an account therein in its own name. And defendant further alleges that all the banking business referred to in said paragraph XII was transacted and carried out under special licenses issued by the Treasury Department of the United States of America by and through its Fiscal Agent in San Francisco, the Federal Reserve Bank; and said defendant denies that said bankrupt advanced to the account of said Consul General of Japan, said Yoshio Muto, the sum of \$39,000.00, or any other sum, in furtherance of said alleged conspiracy, or any conspiracy, or at all, and in this connection alleges that if any conspiracy existed between said Consul General of Japan and said bankrupt, defendant bank had no knowledge or information with reference thereto and was no party thereto, and that any and all deposits so made by either said bankrupt or said Consul General were made in the usual and customary manner of banking business, and all withdrawals thereof by either of said depositors were so made and so withdrawn only upon license duly applied for and received from the aforesaid Treasury Department of the United States of America, upon applications therefor duly and regularly made and filed, and that all such applications were officially investigated and officially passed

upon by the said Treasury Department, as appears of record in the accounts of said defendant Bank.

Furthermore, said defendants deny particularly any and all knowledge of any conspiracy, or alleged conspiracy as between said bankrupt, Nippon Yusen Kaisya and said Consul General, Yoshio Muto, and if any such there was, allege that said bank was no party thereto, and that as to any and all deposits by either of said parties made with said bank at any and all times after the so-called "Freezing Order" of July, 1941, all such deposits were, so far as known to said defendants, made in due course for and on behalf of the said parties independently one of the other and with no connection therewith so far as known to defendants, or either of them, or as may be made to appear from an examination by said conservator of the books and records of said bank, and that if any such agreement were had between the aforesaid parties, said defendant bank was no party thereto, and that, as between said bank and said Consul General, Yoshio Muto, and said Nippon Yusen Kaisya, by virtue of the respective deposits of each of said parties they, and each of them, independently one of the other became, and at all times herein and in said complaint mentioned were, and still are depositors in due course with said bank, and as such entitled to share in the liquidation of said banking business as independent depositors, and not one for the other.

VII.

Answering paragraph XIII of said complaint, said Benjamin C. Corlett, as Conservator of said

defendant bank, denies that said Nippon Yusen Kaisya is the owner of or entitled to any portion of the funds remaining on deposit in the said defendant bank in the name of said Consul General of Japan, and in this connection alleges that any and all sums so remaining on deposit in the name of said Consul General of Japan, Yoshio Muto, are the especial property of said bank and represent deposits so made by said Consul General of Japan in due course with said bank, as aforesaid, and that said Nippon Yusen Kaisya has no right, title nor interest therein or thereto, and never had any right, title nor interest therein or thereto, nor has the Trustee of said Nippon Yusen Kaisya, plaintiff herein, any right, title or interest therein, nor ever did have any such right, title or interest therein or thereto; and said defendants and each of them deny that in truth or in fact, the sum of \$66,892.65, or any other sum at all, standing in the records of said defendant Bank in the name of the aforesaid Consul General, Yoshio Muto, are the property and assets of said Nippon Yusen Kaisya, bankrupt named in said complaint; and deny that such or any part of said funds ever were the property or a part of the assets of said bankrupt, and, in this connection said defendants allege that the only person entitled to make claim thereto or to any part thereof is the depositor thereof or his lawful agent, thereunto duly authorized, and that as to any such claim thereto he is entitled only to such rights as is any general creditor of said bank in liquidation, as a general depositor thereof.

VIII.

Defendant admits that Leo T. Crowley, as Alien Property Custodian of the United States, by virtue of Vesting Order No. 256, issued October 27, 1942, purportedly did vest all of the right, title, interest and claim of said Yoshio Muto, Consul General of Japan, in and to the indebtedness owing to the said Yoshio Muto, Consul General of Japan, by the said Yokohama Specie Bank, Ltd., of San Francisco, and standing in the account of said Yoshio Muto, Consul General of Japan Special Account, which account shows a balance in the sum of \$66,892.65; and that said Alien Property Custodian claims some right, title and interest in and to the funds so standing in the name of said Yoshio Muto, Consul General of Japan at San Francisco, but said defendants deny that said funds, or any portion thereof are the funds of Nippon Yusen Kaisya, bankrupt, or ever were the funds of said bankrupt; and denies that any alleged claims or rights of the said Leo T. Crowley, Alien Property Custodian, in or to said funds are subject to the alleged rights of the Trustee of Nippon Yusen Kaisya, bankrupt, or otherwise or at all, and in this connection said defendants allege that said funds are, and every part and parcel thereof is now, and at all times herein or in said complaint mentioned were the sole property of said defendant bank, The Yokohama Specie Bank, Limited, and that said funds are now, and ever since their deposit with said bank have been, commingled with the assets of said bank and are not now, or ever were severable therefrom, and that the only

interest of any person or persons therein or thereto is that of a creditor of said bank, and that the only person or persons entitled to demand payment thereof is the depositor of said moneys or his duly authorized agent, or such other person or persons as may be legally empowered to make such claim or demand in his behalf, and not otherwise or at all, and that, pending the liquidation of the assets and business of said bank, title to said funds is legally vested in the said defendant, Benjamin C. Corlett as Conservator of The Yokohama Specie Bank, Limited, San Francisco, and that plaintiff has no right, title nor interest therein or thereto.

IX.

Answering the allegations contained in paragraph XX of plaintiff's complaint, this answering defendant alleges that he has no information as to the identity of the defendants therein referred to under the fictitious names of John Doe One, John Doe Two and John Doe Company, a corporation, but that, in this respect, this defendant denies that the aforesaid defendants, or either of them, have any right, title and/or interest in and to the funds standing in the name of said Yoshio Muto, Consul General of Japan at San Francisco, which funds plaintiff alleges to be the funds of Nippon Yusen Kaisya, bankrupt; and, in this connection denies that either the aforementioned defendants or plaintiff ever had or have any rights therein or thereto, whether subject, or otherwise, one to the other, or at all.

X.

Defendant denies that the said, or any part of said sum, of \$66,892.65, standing in the name of said Yoshio Muto, Consul General at San Francisco, is held in trust by the said Yoshio Muto for and on behalf of the Nippon Yusen Kaisya, bankrupt herein, or otherwise, or at all, for any person other than said Yoshio Muto, Consul General at San Francisco, or his legal agent; and denies, generally and particularly, that the plaintiff, as Trustee of the estate of said bankrupt, and/or the creditors of said estate, are entitled thereto; admits that demand has been heretofore made upon the aforesaid George J. Knox, as Superintendent of Banks of the State of California, by plaintiff to have the said account transferred from the name of said Yoshio Muto to plaintiff as such Trustee; and admits that a demand has been made upon him for and on account of any dividends to be paid on the said account by The Yokohama Specie Bank, Limited, in the course of liquidation or otherwise; and that demand was made upon him that all such funds be turned over and delivered to plaintiff as Trustee of Nippon Yusen Kaisya, bankrupt, instead of Yoshio Muto or the Alien Property Custodian; and admits that said George J. Knox has refused, and so long as he was Conservator of said bank and Superintendent of Banks of the State of California, still refused to comply with said demands; and, in this connection, alleges that defendant, ever since he became Conservator of said bank and Superintendent of Banks of said State of California has refused and still re-

fuses to comply with said or any such demands; and, in this connection, said defendant alleges that neither the Alien Property Custodian nor plaintiff herein has any right, title or interest in or to said, or any of said moneys, deposit, dividends and/or accounts representing the same.

XI.

Admits that The Yokohama Specie Bank, Ltd., at San Francisco, claims some right, title and interest in and to the said sum of money, but denies that said or any part of said right, title and interest is subject to the or any alleged right, title and interest of the Trustee for the estate of the bankrupt, plaintiff herein; and in this connection alleges that all of said money belongs to said bank and is a part of its assets under the relation of debtor and creditor as established by the deposit of said funds with said bank, and that the only person entitled to claim any portion thereof is the depositor or his legal representative, and that as to such claim he may not demand the specific funds deposited but only the repayment to him or his legal agent of a sum of money equal to that deposited by him as a depositor of said bank, as a general creditor of said bank, upon the liquidation thereof, and not otherwise.

Wherefore, these answering defendants, The Yokohama Specie Bank, Limited, San Francisco, and Benjamin C. Corlett, as Superintendent of Banks of the State of California and Conservator of said The Yokohama Specie Bank, Limited, pray that the prayer of petitioner herein be denied, and

that plaintiff take nothing herein; that said defendants, The Yokohama Specie Bank, Ltd., of San Francisco, and Benjamin C. Corlett, as Superintendent of Banks of the State of California and Conservator of said The Yokohama Specie Bank, Ltd., of San Francisco, be hence dismissed with their costs of suit herein; and for such other and further relief as to the court may seem meet and proper in the premises.

/s/ BENJAMIN C. CORLETT,
Benjamin C. Corlett as Superintendent of Banks of the State of California and Conservator of The Yokohama Specie Bank, Limited, of San Francisco, substituted defendant in place of George J. Knox, and The Yokohama Specie Bank, Limited, of San Francisco, Defendants.

/s/ S. M. SAROYAN,
Attorney for defendants Benjamin C. Corlett as Superintendent of Banks of the State of California and Conservator of The Yokohama Specie Bank, Ltd., of San Francisco, and The Yokohama Specie Bank, Ltd., San Francisco.

Duly verified.

Acknowledgment of Service attached.

[Endorsed]: Filed May 17, 1943.

In the Southern Division of the District Court
of the United States for the Northern
District of California

File No. 22509-S

LEO. T. CROWLEY, et al,

Intervening Plaintiff,

against

THE YOKOHAMA SPECIE BANK, LTD., et al,
Defendants,

and against

STERLING CARR, et al,

Original Plaintiff and

Defendant in Intervention.

COMPLAINT OF LEO T. CROWLEY, AS HE
IS ALIEN PROPERTY CUSTODIAN, IN-
TERVENING PLAINTIFF.

This action arises under the Act of March 3, 1911; 36 Stat. 1091; U.S. Code, Title 28, Section 41(1) and under the Act of October 6, 1917; 40 Stat. 425; U.S. Code, Title 50, Appendix, section 17; as hereinafter more fully appears.

1. The court has granted leave to Leo T. Crowley, as he is Alien Property Custodian, (hereinafter sometimes called "the Custodian") to intervene as a party plaintiff.

2. The defendant The Yokohama Specie Bank, Ltd., is under the conservatorship of the defendant Ben C. Corlett, as he is Superintendent of Banks of the State of California.

3. The sum of \$66,892.65 stands in the name of

the defendant Yoshio Muto, in an account in said The Yokohama Specie Bank, Ltd.

4. The original plaintiff and defendant in intervention Carr, Trustee, asserts the claim that said bank account is held in trust for the Bankrupt, Nippon Yusen Kaisha, and that as trustee in bankruptcy he is entitled thereto.

5. On October 27, 1942, by virtue of his Vesting Order No. 256, which was filed with the Division of the Federal Register November 21, 1942 and published in 7 Federal Register 9754, the Custodian vested "all right, title, interest and claim of any name or nature whatsoever of the aforesaid Yoshio Muto, Nippon Yusen Kaisha, and the latter's San Francisco branch, and each of them, in and to all indebtedness, contingent or otherwise and whether or not matured, owing to them or any of them by the aforesaid Yokohama Specie Bank, Ltd., or by its said San Francisco branch or by the aforesaid Superintendent of Banks, including but not limited to all security rights in and to any and all collateral for any or all of such indebtedness and the right to sue for and collect such indebtedness."

6. As result of said Vesting Order the Custodian became, and is, the owner of said bank account, regardless of whether it was Muto's, free and clear of any trust, or whether it was held by Muto in trust for Nippon Yusen Kaisha, as asserted in the complaint filed herein by the original plaintiff Carr, Trustee.

Wherefore, the intervening plaintiff, Leo T. Crowley, Alien Property Custodian, demands that:

1. The court adjudge that the aforesaid bank account standing in the name of Yoshio Muto is the property of the intervening plaintiff;

2. Ben C. Corlett, Superintendent of Banks, be ordered to transfer said account to the name of the intervening plaintiff;

3. Ben C. Corlett, Superintendent of Banks, be ordered to pay to the intervening plaintiff any and all remittances, liquidating dividends or disbursements that may be made by him on said account; and

4. That the court adjudge that the original plaintiff, Sterling Carr, Trustee in Bankruptcy, has no right, title or interest in said bank account.

/s/ FRANK J. HENNESSY,

United States Attorney,

/s/ GEORGE A. McNULTY,

Chief, Alien Property Unit, War Division, Department of Justice, Washington, D. C.,

/s/ WALLACE H. WALKER,

Attorney, Department of Justice, Washington, D. C.,

Attorneys for Leo T. Crowley, Alien Property Custodian, Intervening Plaintiff.

Of Counsel:

/s/ A. MATT WERNER,

General Counsel to the Alien Property Custodian.

[Endorsed]: Filed May 20, 1943.

In the United States District Court for the Northern District of California, Southern Division

No. 22509—S

STERLING CARR, etc.,

Plaintiff,

vs.

YOKOHAMA SPECIE BANK, LTD, et al.,
Defendants.

LEO T. CROWLEY, etc.,

Plaintiff in Intervention,

vs.

STERLING CARR, etc.,

Defendant in Intervention.

STERLING CARR, etc.,

Cross-complainant to

Complaint in Intervention,

vs.

LEO T. CROWLEY, et al.,

Cross-defendant to

Complaint in Intervention.

ANSWER AND CROSS-COMPLAINT OF
STERLING CARR,

Trustee in Bankruptcy of Nippon Yusen
Kaisya, to Complaint of Leo T. Crowley,
Alien Property Custodian, Intervening
Plaintiff.

Comes Now defendant, Sterling Carr, Trustee in
Bankruptcy of the estate of Nippon Yusen Kaisya,

bankrupt, and answering the complaint of Leo T. Crowley, Alien Property Custodian and Intervening Plaintiff, admits, denies and alleges as follows, to wit:

I.

Answering paragraph VI of said complaint in intervention said defendant denies each and every, all and singular, the allegations therein contained, both generally and specifically, each and every part thereof.

II.

Defendant alleges that said purported Vesting Order referred to in paragraph 5 of said Complaint, insofar as it effects said Nippon Yusen Kaisya, and the estate of said Nippon Yusen Kaisya, bankrupt, and defendant Sterling Carr, Trustee of the estate of said Nippon Yusen Kaisya, bankrupt, is illegal, void and of no force or effect, and contrary to and a denial of due process, and in violation of the Fifth Amendment of the Constitution of the United States, and in violation of the general provisions of the National Bankruptcy Act; that said purported Vesting Order is an attempt to deprive the Courts of the United States of the jurisdiction conferred upon them by said National Bankruptcy Act.

And By Way of Cross-Complaint

Said Sterling Carr, defendant in intervention and cross-complainant, alleges as follows:

I.

That on the 23rd day of April, 1942, the above-named bankrupt, Nippon Yusen Kaisya, was adju-

licated a bankrupt, and thereafter on July 3, 1942, by proceedings duly heard, Sterling Carr was appointed Trustee of said estate.

II.

That at all times previous to October, 1940, the Yokohama Specie Bank was a foreign banking corporation, authorized to engage in, and engaged in the banking business in the State of California; that ever since the month of July, 1941, any and all of the transactions of said Nippon Yusen Kaisya have been classified as "Blocked" by the Treasury Department of the United States of America.

III.

That on or about the 8th day of December, 1941, George J. Knox, the then Superintendent of Banks of the State of California, took possession of the assets of said Yokohama Specie Bank, Ltd. in the State of California, and from said date up to the 1st day of March, 1943, was the Conservator thereof; upon said first day of March, 1943, defendant Benjamin C. Corlett, the duly appointed Superintendent of Banks of the State of California, as successor of said George J. Knox, took over possession of said assets of said Yokohama Specie Bank, Ltd. in the State of California, and ever since said date has been, and now is the Conservator thereof.

IV.

That at all times herein mentioned, up to December 8, 1941, Yoshio Muto was Consul General for

the Empire of Japan at San Francisco, California, with offices in said City.

V.

That for some years previous to, and during the months of October and November, 1941, Nippon Yusen Kaisya, bankrupt herein, was engaged in the steamship business, conducting a passenger and freight service between the points of San Francisco, California, and the Far East. That one of the vessels belonging to Nippon Yusen Kaisya was the SS. Tatuta Maru, which had left Yokohama, Japan, on or about the 15th day of October, 1941, and was due to arrive at San Francisco on or about the 25th day of October, 1941.

VII.

That ever since the month of July, 1941, by virtue of a Proclamation of the President of the United States, any and all business of Japanese aliens was ordered "Blocked", and any and all transactions of said Japanese aliens thereafter could only be performed after such aliens had obtained a license from the Federal Reserve Bank of their District to carry on such transactions.

VIII.

That during the month of September, 1941, upon the arrival of one of the ships of the said Nippon Yusen Kaisya, the bankrupt herein, said vessel was libelled by numerous American creditors, which libels resulted in various difficulties in securing the release of said vessel upon its sailing date, the necessity of filing of bonds by said Nippon Yusen Kaisya, the bankrupt herein, before the ultimate discharge of the cargo.

IX.

Cross-complainant herein believes and alleges that said bankrupt, anticipating a like experience upon the arrival of its steamer the SS. Tatuta Maru, and to avoid like difficulties to those above referred to, entered into a plan and conspiracy with the Consul General of Japan at San Francisco, and the said Yokohama Specie Bank, Ltd. of San Francisco, whereby it was agreed to have the SS. Tatuta Maru declared as requisitioned by the Japanese Government and thereby secure permission from the United States Government to permit said vessel to arrive at and depart from the Port of San Francisco upon business of the Japanese Government.

XI.

In furtherance of, and in the performance of said conspiracy, it was agreed between said parties thereto that any and all proceeds which were to be received from said voyage of said vessel should be deposited in the names of the Consul General of Japan at San Francisco, said Yoshio Muto, in said Yokohama Specie Bank, Ltd. of San Francisco, there to be held in a secret trust for said bankrupt, and that any and all expenditures in connection with said vessel or its said voyage were to be disbursed by said Japanese Consul General pursuant to instructions of said bankrupt, and that any balance remaining after all of said expenses were paid were to be withdrawn by said Consul General of Japan at San Francisco and paid to said Nippon Yusen Kaisya in Japan.

XII.

That in furtherance of said conspiracy, said Nippon Yusen Kaisya, with the knowledge and consent of said Yokohama Specie Bank, Ltd. of San Francisco, opened an account in the said Yokohama Specie Bank, Ltd. of San Francisco, for said Consul General of Japan, said Yoshio Muto, and advanced to said account of said Consul General of Japan, said Yoshio Muto, the sum of \$39,000. That thereafter, pursuant to said conspiracy, said Nippon Yusen Kaisya proceeded to sell passenger tickets and deposited the proceeds therefrom all with the knowledge of and consent of said Yokohama Specie Bank, Ltd. of San Francisco as to the true facts and purposes of said deposits, in and to the account of said Consul General of Japan, said Yoshio Muto, at said Yokohama Specie Bank, Ltd. of San Francisco.

XIII.

That the actual total amount so collected from said proceeds of passenger and baggage service under said plan and conspiracy amounted to \$65,652.18; that thereafter, and pursuant to instructions from said Nippon Yusen Kaisya, and in furtherance of said conspiracy, said Consul General of Japan, said Yoshio Muto, did disburse certain sums of money as expenses of said vessel, leaving a balance in said account to the credit of said Consul General of Japan, said Yoshio Muto, in the sum of \$66,892.65, and which amount is now on deposit with said Yokohama Specie Bank, Ltd. of San Francisco, and under the control and domination of said

Benjamin C. Corlett, as such Conservator. Cross-complainant herein alleges that in truth and in fact, all of said sum of \$66,892.65, and any and all claims to the collection thereof from said Yokohama Specie Bank, Ltd. of San Francisco, are the property and assets of said Nippon Yusen Kaisya, bankrupt herein.

XIV.

That Leo T. Crowley, Alien Property Custodian, by virtue of Vesting Order No. 256, issued October 27, 1942, did vest all of the right, title, interest and claim of said Yoshio Muto, Consul General of Japan, in and to the indebtedness owing to said Yoshio Muto by said Yokohama Specie Bank, Ltd. of San Francisco, and standing in the account of said Yoshio Muto, Consul General of Japan Special Account, which account has a balance in the sum of \$66,892.65; that cross-complainant herein is informed and believes that said Leo T. Crowley, Alien Property Custodian, claims some right, title and interest in and to the funds standing in the name of said Yoshio Muto, Consul General of Japan at San Francisco, which funds, cross-complainant herein alleges, are the funds of said Nippon Yusen Kaisya, bankrupt; and any and all claims or rights of said Leo T. Crowley, Alien Property Custodian, in or to said funds are subject to the rights of said Trustee of said Nippon Yusen Kaisya, bankrupt.

XV.

Cross-complainant herein alleges that said sum of \$66,892.65 standing in the name of said Yoshio

Muto, Consul General of Japan at San Francisco, is held in trust by said Yoshio Muto for and on behalf of said Nippon Yusen Kaisya, bankrupt, and as such the cross-complainant, as Trustee of the estate of said bankrupt, and the creditors of said estate, are entitled thereto; that demand has been made upon the Superintendent of Banks of the State of California as Conservator of said Yokohama Specie Bank, Ltd. of San Francisco, by cross-complainant herein to have the said account transferred from the name of said Yoshio Muto to said cross-complainant as Trustee of said estate, and in the event of any dividends being paid on the account by the Yokohama Specie Bank, Ltd., in the course of liquidation or otherwise, that all such funds be turned over and delivered to cross-complainant herein as Trustee of said Nippon Yusen Kaisya, bankrupt, instead of Yoshio Muto or the Alien Property Custodian; that said Conservator has refused, and still refuses to comply with said demand.

Wherefore, Sterling Carr, defendant in intervention and cross-complainant herein, prays that:

(1) The Court decree that the funds standing in the name of said Yoshio Muto, Consul General of Japan at San Francisco, Special Account, in the Yokohama Specie Bank, Ltd. at San Francisco, be declared the property of said Nippon Yusen Kaisya, bankrupt;

(2) That the Court declare that the money standing in the name of Yoshio Muto, Consul General of Japan at San Francisco, Special Account, in the

Yokohama Specie Bank, Ltd. at San Francisco, is the property of the Trustee of said bankrupt, and that Leo T. Crowley, Alien Property Custodian, cross-defendant herein, has no right, title or interest in said money; and

(3) For such further order as the Court may deem meet and proper in the premises.

/s/ LOUIS J. GLICKSBERG,
Attorney for Sterling Carr, Trustee of the Estate
of Nippon Yusen Kaisya, Bankrupt, Defendant
in Intervention and Cross-complainant.

Duly verified.

[Endorsed]: Filed May 24, 1943.

[Title of Court and Cause.]

ANSWER OF CROSS-DEFENDANT,
JAMES E. MARKHAM,
Alien Property Custodian to Cross-com-
plaint of Sterling Carr, Trustee in Bank-
ruptcy of Nippon Yusen Kaisya.

1-2. Cross-defendant admits the averments in paragraphs 1 and 2 of the cross-complaint.

3. Cross-defendant admits the averments in paragraph 3 of the cross-complaint, but for further answer states that the duly appointed Superintendent of Banks of the State of California is now Maurice Sparling.

4. Cross-defendant admits the averments in paragraph 4 of the cross-complaint.

5. Cross-defendant is without knowledge or in-

formation sufficient to form a belief as to the truth of each and every averment in paragraph 5 of the cross-complaint.

7. Cross-defendant admits the averments in paragraph 7 of the cross-complaint.

8, 9, 11-12. Cross-defendant is without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraphs 8, 9, 11, and 12 of the cross-complaint.

13. Cross-defendant admits that the sum of \$66,-892.65 is now on deposit with Yokohama Specie Bank, Ltd. of San Francisco to the credit of Yoshio Muto, Consul General of Japan, but except as thus expressly admitted, cross-defendant is without knowledge or information sufficient to form a belief as to the truth of each and every other averment in paragraph 13 of the cross-complaint.

14. Cross-defendant admits that by Vesting Order No. 256, filed with the Division of Federal Register November 21, 1942 and published in 7 Federal Register 5754, the Custodian vested "all right, title, interest and claim of any name or nature whatsoever of the aforesaid Yoshio Muto, Nippon Yusen Kaisya and the latter's San Francisco Branch, and each of them in and to all indebtedness, contingent or otherwise, and whether or not matured, owing to them or any of them by the * * * Yokohama Specie Bank, Ltd. or by its said San Francisco Branch or by the aforesaid Superintendent of Banks * * *"; that the account in the Yokohama Specie Bank, Ltd. of San Francisco standing in the name of Yoshio Muto, Consul General of

Japan, special account, has a balance of \$66,892.65; that as a result of his vesting order the Custodian became, is the owner of, and claims said bank account, regardless of whether it was Muto's, free and clear of any trust, or whether it was held by Muto in trust for Nippon Yusen Kaisya; but except as thus expressly admitted, cross-defendant is without knowledge or information sufficient to form a belief as to the truth of each and every other averment in paragraph 14 of the cross-complaint.

15. Cross-defendant admits that the cross-complainant has made a demand on the Superintendent of Banks of the State of California to transfer the account from the name of said Yoshio Muto to the cross-complainant as trustee for the Estate of Nippon Yusen Kaisya, and to turn over and deliver all future dividends to the cross-complainant as trustee, instead of to Yoshio Muto or to the Custodian; that the Superintendent of Banks has refused and still refuses to comply with said demand; but except as thus expressly admitted, cross-defendant is without knowledge or information sufficient to form a belief as to the truth of each and every other averment in paragraph 15 of the cross-complaint.

Wherefore, the defendant demands that:

1. The court adjudge that the aforesaid bank account standing in the name of Yoshio Muto is the property of the Alien Property Custodian;

2. Maurice Sparling, Superintendent of Banks, be ordered to transfer said account to the name of the Custodian;

3. Maurice Sparling, Superintendent of Banks,

be ordered to pay to the Custodian any and all remittances, liquidating dividends or disbursements that may be made by him on said account;

4. The court adjudge that the cross-complainant, Sterling Carr, trustee in bankruptcy, has no right, title or interest in said bank account;

5. Such other and further relief be given as is consistent with this answer, together with the costs and disbursements of this action.

/s/ FRANK J. HENNESSY,
United States Attorney for the Northern District
of California,

/s/ JOHN F. SONNETT,
Assistant Attorney General,

/s/ HARRY LeROY JONES,
Special Assistant to the Attor-
ney General,

/s/ LOUIS P. HAFFER,
Attorney, Department of Justice, Washington, D.
C., Attorneys for cross-defendant.

[Endorsed]: Filed March 20, 1946.

[Title of District Court and Cause.]

Louis J. Glicksberg of San Francisco, California, attorney for plaintiff.

S. M. Saroyan and Harry P. Calvert, both of San Francisco, California, attorneys for defendants The Yokohama Specie Bank, Ltd., of San Francisco, a foreign corporation, and Maurice C. Sparling, as Superintendent of Banks of the State of California,

and Liquidator of The Yokohama Specie Bank, Ltd., of San Francisco.

Valentine C. Hammack, Special Assistant to the Attorney General, Arthur J. DeLorimier, Attorney, Office of Alien Property, Department of Justice, and Percy Barshay, Special Assistant to the Attorney General, all of San Francisco, California, attorneys for plaintiff in intervention.

MEMORANDUM OPINION

Roche, Chief Judge: This is an action in equity whereby the plaintiff, as Trustee in Bankruptcy of Nippon Yusen Kaisya, a corporation, seeks to have the balance in a bank account in the Yokohama Specie Bank, Ltd., of San Francisco, impressed with a resulting trust in favor of the bankrupt. Nippon Yusen Kaisya, hereinafter referred to as "NYK", is a Japanese shipping company that prior to December 8, 1941, maintained an office in San Francisco. Defendant Yokohama Specie Bank, Ltd., of San Francisco, hereinafter referred to as "YSB San Francisco", is the local office of the Japanese banking company by the same name. Defendant Maurice C. Sparling is the Superintendent of Banks of the State of California and the Liquidator of YSB San Francisco, in Liquidation. He will be hereinafter referred to as the "Superintendent".

Plaintiff in intervention and cross-defendant is J. Howard McGrath, Attorney General of the United States, as successor to James E. Markham, former Alien Property Custodian. Mr. McGrath will

be hereinafter referred to as the "Attorney General".

The trial, which was to the Court without a jury, was presented two issues for decision, one of fact and one of law, as follows:

I. Did NYK furnish or provide the consideration out of which the bank account involved arose?

II. Even if it did, was it a transaction to which the courts can give judicial recognition since it was in violation of Federal laws?

These issues arise out of the following set of facts, as disclosed by the record.

In the period immediately preceding the outbreak of war between the United States and Japan, various vessels owned by NYK operated between the two countries, carrying passengers and cargo. Among these was the M.S. Tatuta Maru. During that period NYK incurred various obligations to American creditors arising out of the operation of its vessels. When, on July 26, 1941, the President of the United States issued Executive Order No. 8832, extending to Japan and Japanese Nationals the freezing controls imposed upon other countries by Executive Order No. 8389, NYK became greatly concerned lest its American creditors attach its vessels in order to satisfy their claims and the Japanese Government became concerned lest it be unable to return its nationals from the United States to Japan. Efforts by the Japanese Government to have NYK exempted from the freezing order were unsuccessful and it was then decided that the same result could be accomplished if the Japanese Gov-

ernment requisitioned NYK's ships and operated them as Japanese Government requisitioned vessels. Accordingly, in October, 1941, the Tatuta Maru was requisitioned by the Japanese Government and in that capacity it made its final voyage between the United States and Japan prior to the outbreak of war on December 7, 1941.

The freezing order which gave rise to the foregoing transaction was, so far as pertinent, as follows:

Sec. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the directions of any foreign country designated in this Order, or any national thereof, if (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

(A) * * * all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

(B) All payments by or to any banking institution within the United States;

* * * * *

(F) Any transaction for the purpose or which

has the effect of evading or avoiding the foregoing prohibitions.

Thus the Japanese Government, The Yokohama Specie Bank, and NYK were prohibited from transferring any credit from an bank in Japan to a bank in the United States, and from making any payment to a bank in the United States if the Japanese Government or a Japanese national had any interest, direct or indirect, in such credit or payment, unless such transfer or payment was licensed by the Secretary of the Treasury.

It was stipulated between the parties that the opening of the bank account involved and all transactions pursuant thereto were subject to this freezing order.

Pursuant to the provisions of the Order, the Secretary of the Treasury issued General License No. 1 on April 30, 1940. As amended and in effect at the times pertinent to this case, it provided, in relevant part:

A general license is hereby granted authorizing any payment or transfer of credit to a blocked account in a domestic bank in the name of any blocked country or national thereof providing the following terms and conditions are complied with:

* * * * *

(ii) This general license shall not be deemed to authorize:

(A) Any payment or transfer to any blocked account held in a name other than that of the blocked country or national thereof who is the ultimate beneficiary of such payment or transfer * * *.

On October 21, 1941, the Japanese Government through Yoshio Muto, Consul General of Japan at San Francisco, made application to the United States Treasury Department, requesting that YSB San Francisco be allowed to receive a remittance in the sum of \$39,000 from the Japanese Government for deposit into a blocked account, in the name of Yoshio Muto, for the purpose of making ship disbursements for the Japanese Government requisitioned ship. It should be noted that in this application, which was made under oath, the Japanese Government expressly represented and warranted that no other than the Japanese Government had any interest, direct or indirect, in the remittance for which a license was applied for therein.

Pursuant to this application the Treasury Department, on October 29, 1941, issued License No. S. F. 11630, authorizing the Consul General of Japan in San Francisco to receive a remittance from the Imperial Japanese Government through the Yokohama Specie Bank, Ltd., Tokyo Office, upon the condition that the money be deposited into a Special Blocked Account in the name of Yoshio Muto, Consul General of Japan, solely for the purpose of ship disbursements pursuant to special licenses authorizing said disbursements.

After the Japanese Government had made its application but before the license had issued, NYK also made an application. In this application No. S. F. 11535, which was subscribed and sworn to on October 22, 1941, NYK stated as follows:

“The applicant (NYK) desires a license in order

to: To handle the Japanese Government requisitioned ship Tatuta Maru in the port of San Francisco, due on or about Oct. 30, 1941, as authorized by the Power of Attorney executed by Yoshio Muto, Consul General of Japan at San Francisco. A notarized true copy of the original thereof is herewith attached * * *

Such action will involve assisting in issuing of tickets for passage fares at this San Francisco Office, and the sub-branch at Los Angeles, and other affairs in connection with the ship's operation. All receipts and all disbursements entered into this operation are independent and bear no connection with the Nippon Yusen Kaisya fund."

By the Power of Attorney which was attached to this application the Japanese Government authorized NYK to act as its Attorney in Fact in all matters, business, operation and affairs arising in connection with the call of the said M.S. Tatuta Maru at the port of San Francisco on October 30, 1941, to November 21, 1941.

On October 29, 1941, the bank account involved was opened in YSB San Francisco with an initial deposit of \$39,000 in the name of Consul General Yoshio Muto, Special Account. Just prior to the opening of this account the Consul General applied to the Treasury Department for a license authorizing the Consul General to receive the sum of approximately \$68,000 into the account involved resulting from the operation of the Japanese Government requisitioned ship. This application was granted and between October 29, 1941, and Novem-

ber 22, 1941, the further sum of \$66,811.42 was deposited in the Special Account. This additional deposit represented income from the sale of tickets for passage fares on the Japanese Government requisitioned and operated ship.

Between November 1, 1941, and December 2, 1941, the total sum of \$39,053.28 was withdrawn from the Special Account. Of this amount \$4,771.56 was for payment of an agency fee to NYK.

All of the foregoing transactions were had under licenses issued by the Treasury Department pursuant to application made therefor, and in each case the Japanese Government through its Consul General again under oath stated and warranted that no one other than the Japanese Government had any interest in the funds in said Special Account.

On December 7, 1941, the Special Account contained a balance of \$66,882.15 and it is this sum that is the subject of this litigation.

On December 8, 1941, defendant Superintendent took over YSB San Francisco for the purpose of conservatorship and/or liquidation under Section 135c and 136 of the Bank Act of the State of California.

On or about April 23, 1942, NYK was adjudicated a bankrupt.

On October 3, 1942, under the authority of the Trading With the Enemy Act, as amended, and Executive Order No. 9095, as amended, the Alien Property Custodian of the United States served upon the Superintendent, Supervisory Order No. 39 and Vesting Order No. 1324. This required the

Superintendent to supervise the business enterprise and property of YSB San Francisco pursuant to the terms of the Supervisory Order and the laws of the State of California. Under Section 136 of the Bank Act of California the Superintendent could reject any claim if he doubted its justice or validity. Under the Supervisory Order he was required to notify the Alien Property Custodian of the nature and amount of the claim and the Alien Property Custodian reserved the right to take whatever action might be necessary or advisable regarding the claim.

Plaintiff presented his claim to the bank account involved; it was rejected by the Superintendent and this action followed.

Plaintiff does not dispute the foregoing facts but contends that the requisition of the *Tatuta Maru* was not a bona fide transaction; that, on the contrary, it was a matter of form only, done to enable the ship to enter and leave American ports without interference from NYK's American creditors and carried out with the knowledge and approval of the United States Department of State; that NYK in fact furnished the money with which the Japanese Government opened the Special Account in YSB San Francisco and was thus the beneficial owner thereof; and that the Attorney General, as successor to the Alien Property Custodian, stands in no better position with relation to such account than would the Government of Japan.

Defendants and plaintiff in intervention maintain that the plaintiff has failed to prove, by competent evidence, any beneficial ownership by NYK. They

further maintain that if NYK had any interest in the moneys in the Special Account, such undisclosed interest can be given no judicial recognition because of the lack of authorization by the Secretary of the Treasury of the United States for any transfer of banking credits or payment of moneys into the said account for the benefit of NYK.

To support his position the plaintiff introduced documentary evidence and the deposition of one Seishi Hiroyoshi taken in Tokyo on interrogatories and cross-interrogatories. Much of this evidence was admitted subject to motion to strike on the ground that it was hearsay and no foundation had been laid. The deposition discloses that the witness was employed in NYK's New York office during the period involved and that his only knowledge of the transaction came from certain papers that he found in the files of NYK's Tokyo office several years later. The Court was liberal in admitting such evidence, having in mind that this is an action in equity. However, it is axiomatic that to establish a resulting trust the evidence must be clear and convincing. In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created. To find such a trust relationship the Court would have to rely on opinions and conclusions of the witness and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests

of the United States had intervened. When this evidence is weighed against the undisputed evidence that the *Tatuta Maru* was operated as a Japanese Government requisitioned vessel, that NYK and the Government of Japan stated under oath that no one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department to be paid an agency fee for its handling of the ship, it falls short of meeting the "clear and convincing" test necessary to establish a resulting trust.

Had plaintiff succeeded, however, his position would be no better. As to NYK the transfer of banking credits from YSB Tokyo to the Muto blocked account in YSB San Francisco and the deposit of additional moneys therein was an unlicensed transaction and hence illegal. The money was lawfully in this country only if the Government of Japan was the sole party having any interest in the fund. To recognize plaintiff's claim would be, in effect, to give judicial approval to an illegal scheme designed to evade the provisions of the freezing order.

The effect of an unlicensed transaction was considered by the United States Supreme Court in the case of *Propper v. Clark*, 337 U. S. 472. There, two days before the freezing order went into effect, a New York State court had appointed a temporary receiver of an Austrian association which admittedly had a valid claim for royalties against ASCAP, an American association. The order of appointment

directed the receiver to take all the Austrian association's assets within the state of New York and hold them until the further order of the court. Several months later the state court ordered the receivership made permanent and directed the transfer of the association's claim to the receiver. Subsequently the Alien Property Custodian vested title and litigation between the receiver and the Custodian followed. The question before the Supreme Court was whether title to blocked assets, which were subject to the licensing provisions, could be transferred by judicial order without a license having been asked for or obtained. Affirming a judgment in favor of the Alien Property Custodian, the Court held that an unlicensed transaction, being in violation of the freezing order, could be given no legal effect.

That decision is controlling here. Under it NYK is in no position to assert legal or equitable title to funds which resulted from transactions that were unlicensed as to the bankrupt and this Court can give no judicial recognition to its claim. It follows, therefore, that the Court can give no judicial recognition to the claim of plaintiff trustee in bankruptcy, which is based on the theory of NYK's beneficial ownership of the funds.

In accordance with the foregoing, therefore, it is by the Court

Ordered that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the defendants and plaintiff in intervention and against the plaintiff and that said defend-

ants and plaintiff in intervention recover their costs of suit.

Dated: August 17th, 1951.

/s/ MICHAEL J. ROCHE,
Chief U. S. District Judge.

[Endorsed]: Filed August 17, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard before the Court without a jury on April 11, 12, 13, and July 25, 1951, Louis Glicksberg, Esq., appearing as counsel for plaintiff, and S. M. Saroyan, Esq., and Harry P. Calvert, Esq., appearing as counsel for defendants The Yokohama Specie Bank, Ltd., of San Francisco, a foreign corporation, and Maurice C. Sparling, as Superintendent of Banks of the State of California, and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, and Arthur deLorimier, Esq., and Percy Barshay, Esq., appearing as counsel for plaintiff in intervention, and said cause having been heard on said days, and evidence, both oral and documentary, having been introduced and submitted, the Court hereby renders its decision as follows:

FINDINGS OF FACT

I.

That at all times mentioned in the complaint on file herein Nippon Yusen Kaisya, was a corporation, organized and existing under and by virtue of the laws of the Empire of Japan, with its principal office and place of business located in Tokyo, Japan; that for many years prior to December 8, 1941, said NYK maintained and operated a branch office in San Francisco, California.

II.

That on or about April 23, 1942, said Nippon Yusen Kaisya, hereinafter referred to as "NYK," was adjudicated a bankrupt by the United States District Court for the Northern District of California, Southern Division, in proceedings No. 34889-W of the records of said court; that subsequently, on or about July 3, 1942, Sterling Carr was duly appointed Trustee of the Estate of said Bankrupt, and at all times thereafter was and now is the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

III.

That at all times mentioned in said complaint The Yokohama Specie Bank, Ltd., was a banking corporation organized and existing under and by virtue of the laws of the Empire of Japan, with its head office in Tokyo, Japan; that for several years prior to December 8, 1941, said bank was duly licensed under Section 7 of the Bank Act of the State of

California to transact banking business in said state, with its principal California office located in the City and County of San Francisco, State of California.

IV.

That ever since the 10th day of December, 1945, Maurice C. Sparling has been and now is the duly appointed, qualified and acting Superintendent of Banks of the State of California and Liquidator of the San Francisco Office of said Bank.

V.

That for many years prior to June, 1941, NYK was engaged in the steamship business, conducting a passenger and freight service between the points of San Francisco, California, and the Far East.

VI.

That at all times mentioned in said complaint, up to December 7, 1941, Yoshio Muto was Consul General for Japan, at San Francisco, California, with offices in said city.

VII.

That on July 26, 1941, pursuant to authority conferred upon him by Section 5(b) of the Trading With the Enemy Act (Act of October 6, 1917, 40 Stat. 415), as amended, the President of the United States issued Executive Order No. 8832 amending Executive Order No. 8389 of April 10, 1940; that said amendment to said Executive Order No. 8389 prohibited, among other things, all transfers of credits between any banking institution within the

United States and any banking institution within Japan and all payments to any banking institution within the United States, if the Government of Japan or any national of Japan had any interest, direct or indirect, in any such credit or payment, unless such transfer or payment was specifically authorized by the Secretary of the Treasury of the United States by appropriate license or otherwise.

VIII.

That on October 21, 1941, through Yoshio Muto, Consul General of Japan in San Francisco, the Japanese Government made written verified application to the Secretary of the Treasury of the United States to authorize the San Francisco Office of the said bank to receive a remittance of the sum of \$39,000.00 from the Japanese Government for deposit to its credit in the United States in an account to be maintained in the name of Consul General Yoshio Muto Special Account; that in said application the Japanese Government admitted under oath to the Secretary of the Treasury of the United States that no one other than the Japanese Government had any interest whatsoever, direct or indirect, in the said \$39,000.00; that on October 29, 1941, the said Secretary of the Treasury granted said application and issued License No. SF 11630 authorizing the said Consul General of Japan in San Francisco to receive said remittance of money belonging solely to the Japanese Government from the Japanese Government through The Yokohama Specie Bank, Ltd., Tokyo Office, on condition that the money be

deposited in a special blocked account in The Yokohama Specie Bank, San Francisco, in the name of the said Yoshio Muto, Consul General of Japan; that on October 29, 1941, by means of a telegraphic transfer of credit from The Yokohama Specie Bank, Ltd., Tokyo Office, to The Yokohama Specie Bank, Ltd., San Francisco Office, there was deposited in The Yokohama Specie Bank, Ltd., San Francisco Office, the sum of \$39,000.00 in the name of the said Consul General Yoshio Muto, Special Account.

IX.

That on October 24, 1941, the Japanese Government, through the said Yoshio Muto, Consul General of Japan in San Francisco, made written application to the Secretary of the Treasury to authorize the said Consul General to receive the sum of approximately \$68,000.00 estimated as the income to result from the operation of the said vessel by the Japanese Government, and to deposit said sum in the said bank account; that on October 29, 1941, the said Secretary of the Treasury issued License No. SF-11631 granting said application; and that between October 29, 1941 and November 22, 1941, pursuant to said license, there was deposited the sum of \$66,811.42 in said account.

X.

That between November 1, 1941, and December 2, 1941, there was withdrawn from the said account the total sum of \$39,053.28 pursuant to written verified applications filed by said Consul General with

the Secretary of Treasury of the United States, and licenses issued by said Secretary of the Treasury granting said applications; that on December 7, 1941, there remained in said account a balance of \$66,882.15.

XI.

That at no time during the period of any of the foregoing transactions did NYK, or anyone on its behalf, disclose to the Secretary of the Treasury that NYK had, or claimed to have, any interest, direct or indirect, in any of the funds deposited in said account; that no application for any license authorizing such transactions as transactions involving funds in which NYK had an interest was ever made to the Secretary of the Treasury; that no license for such transactions as transactions involving funds in which NYK had an interest was ever granted by the said Secretary of the Treasury.

XII.

That for several years prior to October 14, 1941, said NYK owned and operated a steamship vessel, known and designated as the "M. S. Tatuta Maru".

XIII.

That on October 14, 1941 the Imperial Government of Japan requisitioned the said steamship vessel "M. S. Tatuta Maru" by its official requisition order No. EN No. 2044, and by virtue of said requisition became the owner of said vessel and operated said steamship vessel from October 14, 1941 to and including December 7, 1941 for the pur-

pose of returning Japanese nationals located in the United States to Japan.

XIV.

That any and all services performed by said NYK concerning the operation of said steamship vessel from the period of October 14, 1941 to and including December 7, 1941 was as an agent on behalf of the Imperial Government of Japan.

XV.

That on November 21, 1941 said NYK was paid the sum of \$4,771.58 by the Imperial Government of Japan for all services rendered by NYK as agents for the Imperial Government of Japan in the operation of the said vessel by the Imperial Government of Japan for the period from October 14, 1941 to and including November 21, 1941.

XVI.

That at no time did the San Francisco Office of The Yokohama Specie Bank, Ltd., have any knowledge of, or any reason to believe that NYK had, or claimed to have, any interest whatsoever in the funds in said account.

XVII.

That the Japanese Government was at all the times during the period of the aforesaid transactions the sole, legal and beneficial owner of the funds in said account; that the balance of said account in the sum of \$66,882.15 was never at any time held by the said Yoshio Muto in trust for, or on behalf of,

NYK; and that NYK never had any beneficial interest in, or ownership of the said balance of said account.

XVIII.

That by Vesting Order No. 256 dated October 27, 1942, as amended by Amendment to Vesting Order No. 256, dated September 7, 1942, the Alien Property Custodian of the United States, acting under the authority granted by the Trading With the Enemy Act, as amended, seized all interests of said Yoshio Muto or the Japanese Government or the Imperial Government of Japan in said account.

XIX.

That it is not true as alleged in Paragraph X of said complaint that NYK and the Consul General of Japan at San Francisco and said The Yokohama Specie Bank, Ltd., San Francisco Office, entered into a plan and conspiracy to have the said 'Tatuta Maru' declared as requisition by the Japanese Government; that the Japanese Government requisitioned said vessel in good faith for the purpose of returning Japanese nationals from the United States to the Empire of Japan.

XX.

That it is not true as alleged in Paragraph XI of said complaint that it was agreed by and between said Consul General and said The Yokohama Specie Bank, Ltd., San Francisco Office, that any and all proceeds which were to be received from the voyage of said vessel were to be held in a secret trust for

said NYK and that any balance remaining after all expenses were paid, were to be withdrawn by said Consul General at San Francisco Office and said to said NYK in Japan.

XXI.

That it is not true as alleged in Paragraph XII of said complaint that The Yokohama Specie Bank, Ltd., San Francisco Office, had knowledge or participated in the conspiracy alleged in said complaint.

From the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

1. The Court concludes in all respects as set forth in the foregoing Findings of Facts.

2. That until the effective date of Vesting Order No. 256 dated October 27, 1942, as amended by Amendment to Vesting Order No. 256, dated September 2, 1942, the Japanese Government was the sole owner of the entire legal and beneficial interest in the balance of \$66,882.15 on deposit in the bank account maintained in The Yokohama Specie Bank, Ltd., San Francisco Office, in the name of Yoshio Muto, Consul General of Japan, Special Account.

3. That NYK at no time had any interest, legal or equitable, in said account.

4. That no part of the said \$66,882.15 in said bank account ever became part of the assets of the estate of the bankrupt, and that the plaintiff herein never acquired any interest, legal or equitable, in said funds.

5. That if NYK had any interest, direct or indirect, in the funds in said account, the lack of an authorization by the Secretary of the Treasury of the United States authorizing the transfer of banking credits from a banking institution in Japan to a banking institution in the United States and the payment of moneys into the said account for the benefit of NYK, as required by Executive Order No. 8389 of April 10, 1940, as amended by Executive Order No. 8832 of July 26, 1941, precludes this court from giving judicial recognition to any claim by NYK, and plaintiff in this action to a beneficial interest in said account and the balance of \$66,882.15 now on deposit therein.

6. That defendants and plaintiff in intervention are entitled to judgment against plaintiff; that plaintiff recover nothing by this action, and that defendants and complainant in intervention recover their costs herein.

Dated: Aug. 17th, 1951.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed August 17, 1951.

In the United States District Court for the
Northern District of California,
Southern Division

No. 22509-S

STERLING CARR, et al.,

Plaintiff,

vs.

THE YOKOHAMA SPECIE BANK., LTD, et al.,
Defendants.

J. HOWARD McGRATH, et al.,

Plaintiff in Intervention,

vs.

STERLING CARR, et al.,

Defendant in Intervention,

STERLING CARR, et al.,

Cross-complainant to Complaint in Intervention,

vs.

J. HOWARD McGRATH, et al.,

Cross-Defendant.

JUDGMENT

The Court having heretofore signed and filed herein its Findings of Fact and Conclusions of Law:

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff take nothing by reason of its complaint or cross-complaint, and that the defendant Maurice C. Sparling as Superintendent of Banks of

the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, have judgment against the plaintiff for their costs of suit herein incurred amounting to \$6.00 and that plaintiff in intervention have judgment against the plaintiff for its costs of suit herein incurred amounting to \$20.00.

Dated: Aug. 17th, 1951.

/s/ MICHAEL J. ROCHE

United States District Judge.

Entered in Civil Docket Aug. 20, 1951.

[Endorsed]: Filed August 17, 1951.

[Title of District Court and Cause.]

BONDS FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Sterling Carr as Principal, and United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at San Francisco, California, as Surety, are held and firmly bound unto The Yokohama Specie Bank, Ltd., of San Francisco, et al., in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the United States of America, to be paid to the said Yokohama Specie Bank, Ltd., of San Francisco et al, heirs, executors, administrators, successors or assigns, for which payment well and truly to be made and done we bind

ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 2nd day of November, 1951.

Whereas, the aforesaid Principal is filing notice of appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the judgment of the District Court of the United States for the Southern Division of the Northern Judicial District of California in the said suit or proceeding.

Now the Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and virtue.

[Seal] /s/ STERLING CARR

[Seal] United States Fidelity and
Guaranty Company

/s/ By D. S. ARMSTRONG
Attorney-in-fact.

State of California,
City and County of San Francisco—ss.

On November 2, 1951, before me, Dorothy A. Muhlig, a Notary Public in and for the City and County of San Francisco, personally appeared D. S. Armstrong known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and

Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

[Seal] /s/ DOROTHY A. MUHLIG,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Circuit Court of Appeals Under Rule
73(b) of the Federal Rules of Civil Pro-
cedure.

Notice Is Hereby Given that Sterling Carr, Trustee of the estate of Nippon Yusen Kaisya, a corporation, Bankrupt, plaintiff above named, hereby Appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on August 20, 1951.

Dated San Francisco, California, September 11, 1951.

/s/ LOUIS J. GLICKSBERG,
Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed September 11, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Now comes plaintiff above named and sets forth a statement of points upon which appellant intends to rely upon appeal, as follows:

1. The District Court erred in holding that no resulting trust relationship was proven by plaintiff.

2. The District Court erred in holding that any and all of the evidence introduced by the deposition of Seishi Hiroyoshi constituted opinions and conclusions of the witness.

3. The District Court erred in not giving full weight to the correspondence between Nippon Yusen Kaisha, Tokyo, and the Japanese Imperial Government officials occurring years after the resulting trust became effective.

4. The District Court erred in finding that the evidence of Nippon Yusen Kaisha and the Government of Japan, stated under oath, that no one other than the Government of Japan had any interest in the bank account involved, is conclusive as against plaintiff seeking to establish a resulting trust.

5. The District Court erred in finding that insofar as plaintiff's resulting trust theory is concerned, the transfer of the funds was an unlicensed transaction under the freezing orders then in force.

6. The District Court erred in finding that the

decision of the United States Supreme Court in the case of *Propper v. Clark*, 337 U.S. 472 is controlling and makes the transfer of the funds in question an unlicensed transaction.

7. The District Court erred in holding that the Court could give no judicial recognition to the claim of plaintiff Trustee in Bankruptcy.

8. The District Court erred in holding that plaintiff Trustee in Bankruptcy is bound by any illegality that may have been practised by Nippon Yusen Kaisha Tokyo, Nippon Yusen Kaisya San Francisco, or the Japanese Imperial Government.

9. The District Court erred in granting judgment for respondents in accordance with the judgment entered herein on the 20th day of August, 1951, and in not granting judgment for plaintiff and cross-complainant as prayed for by them and each of them.

10. All of the points in the foregoing statement apply to each, all and every of the appeals referred to in the Notice of Appeal heretofore filed by appellant herein on the 11th day of September, 1951.

Dated San Francisco, California, November 1, 1951.

/s/ LOUIS J. GLICKSBERG,
Attorney for Plaintiff and
Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 2, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING APPELLANT'S RECORD ON APPEAL AND DOCKETING APPEAL.

Good Cause Appearing, it is hereby Ordered, Adjudged and Decreed that Appellant, Sterling Carr, Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt, may have to and including the 10th day of December, 1951, to file with the United States Court of Appeals for the Ninth Circuit, the record on appeal as provided for in Rules 75 and 76 of the Federal Rules on Civil Procedure and to docket said appeal with said Court.

Done in Open Court this 5 day of October, 1951.

/s/ OLIVER J. CARTER,

Presiding Judge, United States
District Court.

[Endorsed]: Filed Oct. 5, 1951.

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

Plaintiff above named, also appellant herein, respectfully requests that the following portions of the record, proceedings and evidence be included and contained in the Record on Appeal, to wit:

1. Complaint of plaintiff and appellant on file herein.

2. Answer of defendant The Yokohama Specie Bank, Ltd. and Superintendent of Banks of the State of California.

3. Complaint of Alien Property Custodian as intervening plaintiff.

4. Answer and cross-complaint of Sterling Carr, Trustee, to complaint of Alien Property Custodian.

5. Answer of Alien Property Custodian to cross-complaint of Sterling Carr, Trustee.

6. Order of the Court denominated "Memorandum Opinion" dated August 17, 1951 and filed herein upon said date, ordering that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of defendants and plaintiff in intervention and against plaintiff.

7. Findings of fact and conclusions of law signed by the Court.

8. Judgment entered herein on the 20th day of August, 1951.

9. Appellant's notice of appeal.

10. Order extending time for filing appellant's record on appeal and docketing appeal.

11. Appellant's cost bond on appeal.

12. Statement of points upon which appellant intends to rely on appeal.

13. All of the exhibits introduced in evidence by appellant and respondents (appellees).

14. Reporter's transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the Court,

also all objections or exceptions of counsel, including the proceedings of April 11, 12 and 13, 1951 and July 25, 1951.

15. This designation of contents of record on appeal.

Dated San Francisco, California, November 1, 1951.

/s/ LOUIS J. GLICKSBERG,
Attorney for plaintiff and
appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 2, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant and appellees:

Complaint.

Answer of the Yokohama Specie Bank and the Superintendent of Banks of the State of California.

Complaint of Alien Property Custodian, intervening plaintiff.

Answer and Cross-complaint of Sterling Carr, Trustee, to intervening complaint.

Answer of Alien Property Custodian to Cross-complaint of Sterling Carr, Trustee.

Objections to Plaintiff's proposed interrogatories to be propounded to Seishi Hiroyoski.

Opinion.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Statement of points upon which appellant intends to rely on appeal.

Cost bond on appeal.

Order extending time to docket record on appeal.

Designation by appellant of record on appeal.

Designation by Appellee of additional record on appeal.

Deposition of Seishi Hiroyoski (containing Plaintiff's Exhibits 20-A to 20-J).

Four volumes of Reporter's Transcript April 11, 12, 13, July 25, 1951.

Plaintiff's Exhibits 1 to 31 inclusive.

Defendant's Exhibits A to L inclusive.

Intervenor's Exhibit I-1.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 9th day of November, 1951.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By C. W. [Illegible],

Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California.

No. 22509

[Title of Cause.]

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

April 11, 12, 13, 1951

Appearances: For the Plaintiff: Louis J. Glicksberg, Esq. For the Defendants, (representing Superintendent of Banks of the State of California): Shirley, Saroyan, Shearer & Sullivan, by S. M. Saroyan, Esq. For Plaintiff in Intervention and Cross-Defendant (for the Government, Alien Property Custodian): Arthur de Lorimer, Esq. [2*]

The Clerk: Carr vs. Yokohama Specia Bank, et al, for trial.

Counsel state their appearance for the record, please?

Mr. Glicksberg: Louis J. Glicksberg and Mr. Melvin Friendly, for the plaintiff Sterling Carr.

Mr. Saroyan: S. M. Saroyan and Harry Calbert for the defendant Yokohama Specia Bank and M. C. Sparling.

Mr. de Lorimier: Arthur de Lorimier for the Office of Alien Property representing the Attorney General of the United States as successor to the Office of the Attorney General.

The Court: Proceed, gentlemen.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Glicksberg: Your Honor please, in view of the period of time which the case has been pending in this particular Court, due to unfortunate circumstances, I would like to have Your Honor bear with us a moment until we go back and give a trifle of the historical background and state the position of the plaintiff with reference to his legal rights and what we propose to prove upon which we propose to have Your Honor grant judgment to the plaintiff.

Sterling Carr is the duly appointed, qualified, acting trustee of Nippon Yusen Kaisya, which was a steamship line operating between the home office in Japan and all international places, including the United States. In the United [3] States Nippon Yusen Kaisya, also known as Nippon Yusen Kabushiki Kaisya, had offices in New York, San Francisco and Seattle, and then the further location in the Territory of Honolulu.

In 1941, when relations between the United States and the Empire of Japan became strained, the President, by a proclamation, approximately July of 1941, issued freezing orders. The effect of the freezing orders was to freeze all financial transactions between aliens in the United States and particularly all transactions of currency trade or otherwise without first securing a license from the Treasury Department. The Treasury Department then placed a custodian in possession of all of the assets, physical and otherwise, of the NYK, and I have also been informed, I think it will stipulated and agreed that a further custodian was placed on the premises of the Yokohama Specie Bank.

Prior to the time of the freezing order the Yokohama Specie Bank was one of the main depositors, the bank depositories for the NYK transactions in San Francisco communities. Upon the freezing order only transactions which called for a license and a permit could be entered into by an alien, which included the Nippon Yusen Kaisya.

In August of 1941, one of the vessels of the NYK—I will use the name NYK for short, meaning Nippon Yusen Kaisya—the Tatuta Maru, made the trip from Tokyo, Japan, to [4] San Francisco, and due to the strained relationships between both governments, considerable libels were filed in this district approximating several hundred thousand dollars by American creditors against the Tatuta Maru.

The Court: 1941?

Mr. Glicksberg: 1941. The effect of it was that the vessel was finally released and bonds were placed and the vessel went on its voyage. That voyage was known as Tatuta Maru voyage 68, the Japanese number their vessels, and the voyages, but 68 home and out. When it went from Japan it was called “out” and when it was on its way back it called itself “home”.

About August or September, after having this experience, the NYK then was approached by the Empire of Japan with reference to furnishing three vessels to make a trip to the United States to repatriate the Japanese aliens that desired to return. In order not to have similar conflict as they had with the Tatuta Maru 68 where libels were filed, the records of the NYK in San Francisco and the rec-

ords in Tokyo showed that with the consent of the United States State Department the vessels were presumed to travel as a Japanese requisitioned vessel, the effect of which was to make them immune from attachment or libel in the United States by any of the creditors. That procedure had the sanctity of the State Department and it was agreed so to do. [5]

The records then show that the Empire of Japan treasury department went to the NYK in Tokyo and told them of this arrangement to have these three vessels make the three trips, one to San Francisco, one to Seattle, and one to Honolulu for no other purpose but to repatriate the Japanese aliens. It was not carrying any cargo other than the cargo that went with the passengers, and the Japanese Government in accepting this then told the NYK at Tokyo to advance certain sums of money, to wit, \$96,100 of American dollars which then were to be sent to the various consuls in San Francisco, in Seattle and in Honolulu in order to help defray the expenses, to wit, the coal, the provisions, and everything else that was necessary in the event the passage fare was insufficient.

In Japan likewise there was a freezing order, so the NYK had to make an application to send these sums of money, which totaled \$96,100, to presumably the three consuls. That application by the Empire of Japan was granted and the NYK forwarded to the United States, three consuls, \$96,100. \$39,000 went to Consul General Yoshio Muto, who is one of the defendants in this particular case, standing to

represent the Empire of Japan. \$33,500 went to Consul General Yuki Sato at Seattle, and the balance went to the consul in Honolulu.

That transfer of money was by telegraphic transfer, not to the bank that the counsel used for its international [6] purpose, but to a special account. In other words, heretofore the Japanese monies that were transferred to a counsel were, came from the Bank of Japan. This came from the NYK, Yokohama Specie Bank in Tokyo to the Yokohama Specie in San Francisco, the \$39,000 to the account of Yoshio Muto, consul general, and with instructions to transfer the \$33,500 to Seattle Sumitomo Bank, because the Yokohama Specie Bank had no bank in Seattle.

The money was then transferred and Consul Muto opened up a special account called "Consul General Muto" for this Japanese-requisitioned vessel. The first entry in that account is the \$39,000 in San Francisco which came from the funds of the NYK in Tokyo.

We are not concerned at this particular moment before Your Honor with the Seattle case nor with the Honolulu case, confine ourselves solely to the San Francisco matter.

The vessel that came to San Francisco was the Tatuta Maru and this voyage was called 69 out from Tokyo and then home when it took the Japanese aliens back.

In order to follow through with the plan, Consul General Muto files an application for a license with the Treasury Department to appoint the NYK as

its agent, as his agent, to collect all of the funds, to negotiate all the travel certificates, to issue certificates, transfer tickets and do everything possible in his name. The vessel comes in and [7] as a result the NYK—when I say the NYK, the officials and the employees of the NYK—do everything, purchase materials, issue tickets, collect funds and on the whole do everything as they had done before, save and except they had a stamp made and on all of the tickets and on all of the checks that were paid, it called itself Japanese Requisitioned Vessel. The funds were deposited in the Yoshio Muto special account.

In addition to the \$39,000 which came from the NYK in Tokyo, the proceeds from the sale of transfer fares, tickets to the Japanese aliens in San Francisco and in New York and in Los Angeles, cash went into this particular Yoshio Muto account with the result that at the time war was declared—I shouldn't say that—at the time the vessel left, which was November 2 or November 3, 1941, there remained in this particular Yoshio Muto special account approximately \$66,800-odd, all of which came from the \$39,000 original consideration from the NYK plus the passenger fares that were collected in the United States, less the expenditures which were paid out here. And incidentally, from the records of the NYK, and we find, although the expenditures were made from the consul general account, all of the bills were billed directly to the NYK as if it was its own transaction.

This sixty-six thousand odd dollars, which re-

mains in the account in the Yokohama Specia Bank is the fund which is [8] presently in question, as further circumstances that the operation of the vessel under the name, as a requisitioned vessel, was purely a nominal operation and that the funds really belonged to the NYK.

We find in the records of the NYK and also from the deposition which has been taken of Japan records, from the Empire of Japan Treasury Department, stating that they have no interest in this fund, that the fund is the fund of the NYK.

In addition to that, from the records we find numerous tickets were issued to Japanese-Americans—I mean Japanese residing in the United States—upon instructions of the NYK in Tokyo or in Yokohama, stating that the San Francisco office of the NYK should issue tickets to these respective individuals because they there have received the necessary fares. In checking the records in Tokyo we find that the proceeds from the necessary fares, which were ordered in Tokyo by Japanese in Tokyo, went into the account of the NYK in Tokyo.

In addition thereto we find a great number of passengers there were allowed to board this vessel and return by giving notes to the NYK that payment will be made in Tokyo. In other words, firms like Mitsubishi, Mitsui, the Osaka, which were well established firms, not having money here and not being able to get a license in order to have their passage [9] fare paid of their individual residents of the United States they wanted to return, would give a note to the NYK upon which was stamped

Yoshio Muto Japanese Requisitioned Vessel, and those funds, the deposition will show, never were paid to the Empire of Japan, but were paid in Tokyo to the NYK in Tokyo.

In other words, all of the circumstances, including the depositions which will include letters received by the NYK from Japan, will disclose to this Court that the Empire of Japan has no interest in this money of any kind and character and that the main purpose of really using Japanese requisitioned vessels under the name of the counsel general at San Francisco was to allow the vessel free passage, free entry and free entry out without the necessity of being subject to the general laws of attachment and libels of the American creditors.

The trustee, upon being appointed a receiver in 1942, in 1943, early 1942, early part, first as a receiver and then as a trustee, came into possession of all of the records of the NYK in San Francisco. An in checking those records immediately became aware of this Yushio Muto account of sixty-six thousand odd dollars. In 1941—1942 summary proceedings were commenced in Referee Judge Wyman's Court here against the Yokohama Specie Bank requesting them to turn over this fund of \$66,000 to the American creditors of the [10] NYK, the NYK having been adjudicated a bankrupt by that time.

Mr. Saroyan appeared for the Yokohama—for the Superintendent of Banks of California, originally by a gentleman by the name of Knox as the custodian having taken possession of Yokohama Specie Bank for purposes of liquidation under the Cali-

fornia Bank Act, at the time of the outbreak of the war, and since that time in the summary proceedings there was considerable controversy as to whether they should be subject to summary orders or otherwise.

As a result there was an appearance by United States District Attorney Hennessy's office, Mr. Lynch, stating to the referred in bankruptcy that the Alien Property Custodian at that time felt he had some interest in the proceedings and would much prefer not to have the summary proceedings continued, that if anything they would like to have them dispose of it by a plenary suit. At that time there was some controversy, discussion, as to whether their summary proceedings should be continued but as a result of it all we were all called before the judge, St. Sure, at that time, and that it was then decided that we should proceed to file a plenary suit joining all parties and appearances to be made.

Sterling Carr, as trustee, files the suit which is before Your Honor at the present time which is in the nature of a quiet title action to personal property standing in the name of Yoshio Muto stating that the proceeds of that account [11] are in truth and verity and property of the NYK and as such should go to the American creditors, the liquidation and administration of which are instituted from this particular district.

Yoshio Muto is joined and the United States Government is joined in that particular suit by virtue of an allegation that the United States Government claims some interest and title to the particular fund

in question. The United States Government appears and proceeds to file a motion to dismiss with a petition for intervention stating that they cannot be sued because we have no right to sue the United States, but nevertheless they will enter the case as a plaintiff in intervention and they filed their petition—their complaint in intervention and become a plaintiff in the case.

The trustee, Sterling Carr, in bankruptcy, then answers the complaint of intervention of the United States and in addition thereto files a cross-complaint against the United States that not only is it not their money, but asking for a decree of this court asserting that the Alien Property Custodian or the United States has no interest. I forget to state that the claim of the United States arose out of and by virtue of a vesting order in the office of Alien Property Custodian.

Well, at that time the Office of Alien Property Custodian, after our summary proceedings, vested itself of all of [12] the right title and interest in the Yoshio Muto account on the ground that Yoshio Muto is a Japanese alien and as such they are entitled to have the proceeds from that account. In the complaints for intervention the United States Government by and through the Office of Alien Property Custodian sets forth those particular facts that they have vested it and assert that Sterling Carr as the trustee of the American creditors have no interest, that their interest is superior.

In answer to our cross-complaint which asks for relief, the Alien—United States Government files

a general denial. The Superintendent of Banks, through Mr. Saroyan, answering his complaint, admits certain allegations, to wit, that Sterling Carr's appointment, his qualification, admits the vesting order and states that it has in its possession this account in the amount of sixty-six-odd thousand dollars, but states that because of the vesting order which it received from the Alien Property Custodian and plaintiff has no interest in that particular fund.

I might state also, Your Honor please, that nothing was done in the case until 1945; because of the continuation of hostilities, nothing could be done. The basic thought of Sterling Carr was to attempt, actually have someone go to Tokyo and search the records and find out what happened. In '46, '47, I think it is, a representative, Mr. Glicksberg, went to Tokyo, and discussed the facts, and examined the [13] records with the officials of the Yokohama Specie—there was no Yokohama Specie Bank there, but with the custodians of the Yokohama Specie Bank and also the officials of the NYK, which is still in existence in Tokyo and with certain Treasury officials, as a result of which in 1947, when Mr. Glicksberg returned, there was communications between Mr. Saroyan and Mr. Glicksberg as to whether or not depositions should be taken, oral depositions, interrogatories, and finally considerable proceedings were had before this court. Written interrogatories were submitted, written interrogatories were settled, and communications were issued to take depositions, the answers to the interrogatories,

and the interrogatories are presently on file, on one witness, Mr. Seishi Hiroyoshi.

It will be disclosed from the interrogatories that Mr. Hiroyoshi has introduced in the deposition numerous correspondence between NYK, Tokyo, and the Empire of Japan in which these particular funds, not only San Francisco, but Seattle and Honolulu, were all considered and discussed and the positions of the Empire of Japan and NYK were firmly set forth in those letters which we hope to introduce by way of deposition, stating that in reality the Empire of Japan has no interest in this fund of sixty-six thousand odd dollars and that the purpose of it was, as a result, from the original consideration plus the proceeds from the passenger fares, [14] less the costs, in reality is an asset of the NYK. Such admissions are in the exhibits which we hope to be able to introduce.

The position basically then, if Your Honor pleases, that we have a trustee in bankruptcy asserting a right to a considerable fund in possession of the Superintendent of Banks of California with the United States Government, by and through the Office of the Alien Property Custodian, standing by and asserting that the Office of the Alien Property Custodian is entitled to this fund instead of the trustee for the benefit of the United States creditors.

The position of the Superintendent of Banks is very anomalous to me. They should be in the position of an interpleader because,—interpleader, and intervener, if I may say by stating to this Court,—as it does state that they hold this fund and they

have \$68,000 presumably standing in the name of Yoshio Muto and that they are prepared to abide by any decision of this Court to determine as to whether the trustee in bankruptcy by and in virtue of having the rights of judgment against the NYK for the benefit of the American creditors as to the right of take these funds and distribute them to American creditors rather than giving them by virtue of the vesting order to the Alien Property Custodian.

I might state that the Alien Property Custodian, by virtue of his vesting orders, approves of the administration [15] of the NYK in bankruptcy in this jurisdiction because in its vesting order it states—it vests itself—it admits nothing, it states that Sterling Carr is presently administering the assets of NYK and does state it vests itself of any right of the Yoshio Muto case after this administration. Such is the position of the plaintiff in this particular case.

The theory, the legal theories of the case are as follows: irrespective of any question of fraud we have before this Court an actual case of a resulting trust. In other words, consideration having been given by the NYK in Tokyo which finds itself, mind you, for the sole consideration,—finds itself in this Yoshio Muto account to which is added the sole consideration of the fares for services which the NYK itself paid for in San Francisco and subsequent voyage charges home were paid for by NYK because the employees on the vessel were paid when they came back to Tokyo, with the result that we have a typical case of a resulting trust, consideration being given by the NYK, all of the proceeds

from consideration of services rendered by the NYK, and we are going to ask this Court to decree that the fund standing in the name of Yoshio Muto is in reality the fund belonging to the NYK and if we succeed in doing that we will ask for a judgment at Your Honor's hands in favor of the trustee in bankruptcy.

Mr. Saroyan: Will Your Honor allow me at this time for [16] the defendant to make its opening statement?

The Court: Certainly.

Mr. Saroyan: I promise I won't be as lengthy as Mr. Glicksberg. Mr. Glicksberg has stated I represent the State Superintendent of Banking as liquidator of the local office of the Yokohama Specie Bank.

This Bank, prior to Pearl Harbor, transacted business in California under Section 7 of the State Bank Act. I won't take the time of the Court now at this point to read that section to Your Honor, but the examination of the Act will show that this local office of a foreign banking corporation performed its functions as a bank as far as its deposits and accounts were concerned just as an independent bank with its deposits and accounts kept separate and apart from the general business, the general assets and the accounts of the foreign corporation, and just as if its business was that of a separate and independent corporation organized under the laws of the State of California doing business in California.

On December 8, the day after Pearl Harbor, the

Superintendent stepped in and took over the affairs of the bank under Section 135-C and 136 of the Bank Act because he thought that it was unsound and unsafe and incompetent for it to continue transacting business.

About three weeks later, on January 12th, he placed the bank under a conservator, and in March of 1945 he placed it [17] in liquidation. I am not going to dwell on the question of freezing orders as Mr. Glicksberg has explained to Your Honor the freezing orders, but I will state that—I believe he will agree with me—that the transactions involved in this litigation were all of the type covered by the freezing orders and required licensing.

Then the next stage of the proceeding in October of 1942, the Alien Property Custodian of the United States served the Superintendent of Banks with a Supervisory Order No. 39 whereby he undertook, the Alien Property Custodian, to supervise the conservatorship and liquidation proceedings, and so doing up to date.

On October 27 of 1942 the Custodian served the Superintendent with a telegraphic vesting order purportedly vesting this so-called Yoshio Muto special account involved in this action.

In April of 1943, the following year, the Alien Property Custodian served the Superintendent of the Banks with a Vesting Order No. 1324, vesting all the excess proceeds of this bank. The bank records here will show that at the time of taking by the Superintendent the records of the bank disclosed a blocked account, "blocked" meaning one that

would require a Treasury license for either deposits and/or withdrawals. This account was standing in the name of Yoshio Muto, consul general, special account. I think the [18] balance here as Mr. Glicksberg said, \$66,884.15, and that is the account that gave birth to this action.

The records further show that the original deposit of \$39,000 that has been made into this blocked account was by a telegraphic transfer from the Japanese Government in Tokyo through the Tokyo office of the Yokohama Specie Bank and not from anywhere else. This telegraphic transfer and deposit was made pursuant to a verified application filed by Muto to the Treasury Department of the United States and a license issued to him based thereon authorizing the transaction by allowing the receipt of a remittance of \$39,000 from the Japanese Government into the blocked account in the name of Muto for the purpose of making ships' disbursements for a Japanese Government-requisitioned ship.

Mr. Glicksberg in his opening statement said the requisitioning of the vessel was a nominal operation. If Your Honor was to hold the requisitioning of the ship was a nominal operation, it would place fraud on the United States Government in view of the fact, the verified fact, the Treasury Department said otherwise. An examination of the application and license will show that Muto, a representative of the Japanese Government, shown under the order, Paragraphs C, D and E, and represented and warranted to the Treasury Department that no other

party other than those mentioned therein had any interest, direct or indirect, in the transaction [19] for which a license was being applied for. The NYK lines was not mentioned in this and in the one to the so-called remittance application for a license subsequently filed. I refer to the remittance application because in this case Your Honor will note that there were two applications filed by Muto for the purposes of receiving money into the account and there were, I believe, eight applications for licenses filed by Mr. Muto for the purpose of making withdrawals from the account.

This other application that Muto filed was for a Treasury license to allow the receipt into the blocked account of a sum of approximately \$68,000 resulting from the operation of the Government-requisitioned *Tatuta Maru* that Mr. Glicksberg referred to, and these funds were to be utilized, according to the remittance application, were to be utilized in connection with the operation of the government ship under special license authorizing the disbursements.

The bank records will show first that there were two deposits made in the Muto account pursuant to the two remittance licenses issued by the Treasury Department. They will also show there were eight disbursements made pursuant to six so-called disbursement licenses applied for and—I should correct that, I said eight; there were six. So the records will show that NYK lines name appeared nowhere in the bank's record excepting in connection with one very [20] significant item and that is this: that on November 8th, 1941, approximately 28 days

before Pearl Harbor an application was filed by Muto with the Treasury Department and the Treasury license number 12971 was issued on November 19,—about two weeks before Pearl Harbor—licensing the withdrawal of an amount not exceeding \$4,771.58 from the so-called Muto blocked account and licensing payment of that amount to NYK lines here in San Francisco for deposit to a blocked account maintained by NYK lines in the same name and the application and license said that payment was to cover certain specified expenses in connection with the handling of the Japanese Government-requisitioned ship Tatuta Maru. The name NYK Lines does not appear anywhere else in this account. As Muto, Japanese Government or NYK, any monies, it was licensed for payment and subsequently paid in full by a withdrawal and a deposit to the NYK account shown by our records on November 21, 1941, two weeks before Pearl Harbor in the sum of \$4,771.58.

May it please the Court, during the conservator proceedings the trustee of NYK asserted a claim against the superintendent for this amount, sixty-six thousand some odd dollars, the amount of the balance in the Muto account, and pursuant to the Bank Act which required the superintendent to verify the validity of the claim, he rejected the same and this action was subsequently filed. [21]

Under the Custodian Supervisory Order the Custodian has advised me that NYK Lines has not established ownership of the Muto account and that

the question should be litigated and decided by this Court.

In this case the superintendent's contention is that in view of what the bank records show and even under the plaintiff's own statement of the nature of the transaction the plaintiff should not and could not recover under the law.

Here is our theory of the case. The balance of this account was not and could not have been money received by the bankrupts, or by the bank, by the Yokohama Specie Bank from NYK directly or indirectly as a trust account or otherwise.

Secondly, that any transaction that may have been engaged in between the Japanese Government and NYK may have created a debtor-creditor relationship between the Government of Japan and NYK, with the Government as debtor and NYK as creditor, but no monies remitted by the Japanese Government for deposit to the Muto account belongs to the NYK; might be a debtor-creditor relationship between the Japanese Government in Japan and NYK Lines, but has nothing to do with this account. This account came into San Francisco for deposit to the Yokohama Specie Bank, money belonging to the Yoshio Muto fund, but it is principally the Government of Japan.

Thirdly, that Muto in his sworn application filed with the Treasury Department represented and warranted that no other person other than the Japanese Government and Muto [22] had any interest in the transaction.

Fourthly, that all the funds that went into this

account over and above the initial deposit of \$39,000 was never in the hands of or belonged to the bankrupt. That represented income to the Japanese Government from the operation of the Japanese Government-requisitioned ship *Tatuta Maru*. But for the sake of argument, at least, the original \$39,000 came from NYK Tokyo to the Japanese Government in Tokyo, then from the Japanese Government to the local bank here in San Francisco into the account of Yoshio Muto, then it must be contended, may it please the Court, that these monies have all been disbursed pursuant to license exceeding the \$39,000 withdrawn and disbursed from this account.

Fifth, under the freezing orders, a transfer into the Muto account of funds belonging to NYK was impossible and expressly prohibited by virtue of the freezing orders and we have the United States Supreme Court case of *Proper vs. Clark* as authority for that.

Sixth, under the Bank Act the local bank was required to conduct its business as a separate and independent banking relation to the home office in Tokyo as far as deposits and accounts were concerned.

Seventh, if NYK lines had any money coming from Muto, the bankrupt corporation was paid in full on November 21, 1941 by the payment of the sum of \$4,771.58 pursuant to the [23] Treasury license.

Mr. Glicksberg said that in our answer the superintendent merely states that because of the vesting order the money belongs to the Government. That

isn't what the answer states. The answer states that the money belongs to Muto, according to our records, and according to our investigation, and if the money belongs to Muto, as the result of a vesting order served on the Superintendent of Banks by the Alien Property Custodian that it would go to the United States Government as the result of a claim filed on the said vesting.

I'm going to ask Your Honor to be patient with us at this time. As far as oral interrogatories are concerned, merely on my statement that those oral interrogatories are exhibits coming from Japan and reeking with hearsay testimony and testimony that would not be admissible under Section 26-B of the Rules of this Court, Rules of Procedure, there are items there, there are writings there that didn't come into the possession of NYK for a year after Pearl Harbor and some of it six years after Pearl Harbor—ask the patience of this Court to allow me to make my objection to each interrogatory and each exhibit as it is offered in evidence, and after we have put on our evidence we ask that the Court hold that the superintendent must look to Muto as the owner of the account and to direct to pay any and all dividends on this account to the Office of Alien Property Custodian or the Attorney General [24] of the United States as vestee of the account. And with Your Honor's permission, if there is no objection on the part of Mr. Glicksberg, I would like to file with Your Honor at this time a trial memorandum that I have prepared, if it is not against the rules of the Court.

Mr. Glicksberg: I am going to resist any trial memorandum at the present time. I have no objection when the case is submitted; don't think we should file——

The Court: Probably assist the Court in following the testimony.

Mr. Glicksberg: Following Mr. Saroyan's testimony.

The Court: You may duplicate it, if you wish, if you have a copy of it.

Mr. Saroyan: Your Honor give us the opportunity later to file a further memorandum? Because this doesn't cover the subject thoroughly.

The Court: May I inquire now is the Property Custodian represented here?

Mr. de Lorimier: I am, Your Honor. I think this matter has been well taken care of by both Mr. Glicksberg and Mr. Saroyan so far as the position of the Alien Property Custodian is concerned.

The Court: Hasn't he any interest in this litigation, the Property Custodian?

Mr. de Lorimier: We have a big interest. We have a [25] vesting order which I would like to present to Your Honor.

The Court: Well, this is not the time.

Mr. de Lorimier: I mean to say, will you gentlemen agree that I can present this vesting order to the Court?

Mr. Saroyan: No objection on the part of the defendants, Superintendent of Banks.

Mr. Glicksberg: I think it is out of order.

Mr. de Lorimier: All right.

Mr. Glicksberg: I have no objection of it going in at the proper time.

The Court: For the purpose of the record what is the position of the Alien Property Custodian?

Mr. de Lorimier: He is,—well, here is the position of the Alien Property Custodian, to show in the pending litigation that the funds in question are part of the property of the Japanese Government owned by Muto, the consul general. Then of course this account should be paid over to the Office of Alien Property.

Our participation in the action should be on this ground, and that is our particular—we, Your Honor, take the position that these funds that were paid to Muto, the consul general, were funds that came from the Imperial Government of Japan. That is the sense of it. Wherefore, and in that respect we agree with Mr. Saroyan and disagree with Mr. Glicksberg. That is our position. The evidence will be [26] adduced by them. We will await the outcome of the trial and submit our vesting order, and we stand on it.

The Court: Everyone said everything they wish at this time?

Mr. Glicksberg: Your Honor please, I don't know whether it is proper at this time to just make this statement, but from listening to Mr. Saroyan and listening to Mr. de Lorimier we find that we are going to have our mighty adversary, the Yokohama Specie Bank, or the Superintendent of Banks, who is merely a stakeholder here attempting to assert various defenses when we are only asking this Court

to state whose funds the \$68,000 are, and if they are the funds of NYK, the question of a license, the question of a subsequent proceeding to obtain the licenses, or the question as to whether Mr. Muto falsified in making the statements in securing his original license, is entirely immaterial. We merely have a case here where two people claim the right to a fund which is in the hands of the Superintendent of Banks. The Superintendent of Banks admits "I owe that money, I owe it to somebody." And the Superintendent of Banks, Mr. Saroyan, rightfully has said "I don't want to take it upon myself to judicially determine to whom these funds belong." We should allow the Court to do that, presumably from,—after a trial on the merits. Why Mr. Saroyan should then proceed to become a martyr to the cause and take on the case for the Alien [27] Property Custodian I cannot understand.

The Court: Is this a closing argument?

Mr. Glicksberg: No, Your Honor. I think it will be proper from the arguments, from the statements of both counsel to even make a motion at this time to have Mr. Saroyan, the Yokohama Specie Bank and the Superintendent of Banks, deposit the funds in this Court and then have the action proceed between Sterling Carr, the trustee in bankruptcy, and the Alien Property Custodian.

The Court: Now, may I offer a suggestion?

Mr. Saroyan: May I answer Mr. Glicksberg by ten words?

The Court: I will limit you to ten words.

Mr. Saroyan: That isn't what the Bank Act says,

and the Alien Property Custodian has directed us to litigate this matter. If Your Honor were to take Mr. Glicksberg's statement to heart, he doesn't want any opposition here, either the Government or the Superintendent of Banks is entitled——

The Court: Are there any stipulations you can enter into for the purpose of the record, gentlemen? We will take a recess for that purpose; you can get together on the matter that is not in dispute so the record may be made clear.

In relation to the interrogatories, and objections thereto, without doing violence to your legal rights I usually allow them to go in subject to motion to strike over your objection. [28]

Mr. Saroyan: That will be agreeable to us.

The Court: Go along and no one is waiving any legal rights they may have.

Mr. Saroyan: We have no objection to the first seventeen questions, and from then on, if Your Honor will give me an opportunity to make any objection and motion to strike.

The Court: Now we will take a recess with the hope that you will get together in the interest of time on matters there is no dispute about—for the purpose of the record.

(Short recess.)

The Court: You may proceed, gentlemen.

Mr. Glicksberg: Your Honor please, we have discussed the suggestion of Your Honor that we enter into a stipulation. I think, after discussing it with Mr. Saroyan, we will, most of the things will be

stipulated to, but in an orderly fashion we thought, at least I thought it would be better to have them stipulated to as we go along instead of making a blanket stipulation for things we would have to refer to time after time, present them in chronological order.

Mr. Saroyan: I think, Your Honor, the exhibits we will stipulate to, if they went in chronologically, I think it would be easier for all of us to follow.

The Court: Very well.

Mr. Glicksberg: I would like to introduce, if Your Honor please, a passbook of Yokohama Specie Bank, Limited, [29] San Francisco, captioned "In account with Yoshio Muto, Consul General of Japan, special account." It came into the possession of the trustee in bankruptcy from the records of the NYK when we took over all of the records.

Mr. Saroyan: No objection, Your Honor.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence.

(Whereupon the passbook above referred to, marked Plaintiff's Exhibit 1, was received in evidence.)

Mr. Saroyan: Mr. Glicksberg, let me ask you this question: This is the only checkbook that you were able to find that pertained to this account?

Mr. Glicksberg: That is correct.

Mr. Saroyan: Can I ask you what this check is here (indicating)?

Mr. Glicksberg: This check is evidently a can-

celled check number 64, which was cancelled. That is the way the Japanese minutely every one of the records.

Mr. Saroyan: No objection.

Mr. Glicksberg: I would like to introduce, if Your Honor please, a checkbook captioned "Yokohama Specie Bank, Ltd.," and I am reading from the checks which have not been used, bearing a stamp on top of it "Reviewed" with a line "Date by the Examiner of the Office of the Comptroller of the [30] Currency." Below it we have another stamp, "Federal Reserve Bank, License No. S. F." with a place for a number, and then below the signature we have "Consul General Yoshio Muto Special A/C," by so-and-so. The printed form, the portion—the checks number from 1 to 66 and have been checks which evidently have been used and withdrawn from this particular account. It is a book and record which was kept by the NYK and came into the possession of the Trustee upon taking over the records of the NYK, evidently having to do with the Consul General Yoshio Muto account.

Mr. Saroyan: Mr. Glicksberg, will you have any objection if were to take two checks, supply one to Mr. de Lorimier and one to me?

Mr. Glicksberg: No. Withdrawing from the book, Your Honor, checks number 199 and 200 for examination by counsel.

The Court: May be admitted next in order.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

Mr. Saroyan: No objection.

(Whereupon the checkbook record above referred to, marked Plaintiff's Exhibit No. 2, was received in evidence.)

Mr. Glicksberg: On behalf of the plaintiff, Your Honor please, we would like to introduce a record the NYK captioned "Record of passengers carried" which commences with a record of the vessel Tatuta Maru 67 home, sailing on June 5, 1941 [31] and ends with the record of the Tatuta Maru voyage number 69 home, which the only one that has stamped upon it, the first four pages, "Japanese Government-requisitioned ship" and there are some hieroglyphics in Japanese which I assume mean the same thing, Japanese requisitioned ship, as one of the records which are kept by the NYK and came into the possession of the trustee upon taking over the assets.

The Court: It may be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 3 admitted and filed in evidence.

(Whereupon the book above referred to, "Record of Passengers Carried" marked Plaintiff's Exhibit No. 3, was received in evidence.)

Mr. Glicksberg: For the record, Your Honor please, we would like to call attention that this purports to be a record of passengers carried on each particular vessel of certain voyages commencing with June 5 up and including November 2, 1941 of the NYK, setting forth the number of passengers of the first-class Japanese and others, number of

passengers of the second-class and others, number of passenger of third-class and others; also setting forth their destination, whether they go to Honolulu, Yokohama, Kobe, Nagasaki, Shanghai, Hongkong, Manila, and the total of the passengers, and passenger fares which have been collected on the respective voyages. [32]

The Tatuta Maru 67 home, which is the first one in this book as of June 2nd, would consist of 1, 2, 3, 4, 5, 6, 7, 8 pages and which show bookings from London and Los Angeles, from New York to Los Angeles to the various destinations which we set forth in number and also in currency, amount received and then a total recapitulation at the end of each page, passengers from Chicago and Los Angeles; on the next page passengers from Los Angeles individually, and then from San Francisco—there were none on this particular voyage—and on passengers from San Francisco on 67 home there are two pages.

Now, with reference to the Tatuta Maru I would like to call Your Honor's attention and read for the record, that the records are kept identically the same as for all other vessels, save and except we have the one stamp on top of these four pages which I would like to specifically—three pages—introduce in evidence, the words "Japanese Government-requisitioned ship."

The first page, which shows from San Francisco on the Tatuta Maru, voyage number 69-H, home, sailing on November 2, 1941, first-class Japanese passengers going to Yokohama, "2 over 41-3-1" for a total of \$532.30, \$14,458.50. Others, one for \$340.

Then on the second-class we have Japanese 27 and 4, which are four minors, breaking them down where they have [33] full tickets and half tickets. The amount of currency involved was \$538.50 and \$5,330. Other nationalities than Japanese, two, for \$410.

And then on the third-class Japanese we have 295 with 33 and with 2, making a total of 335 passengers for a total of \$20,146.60, from San Francisco.

Page number 2 of the same voyage shows those booked and paid for from Los Angeles to San Francisco, and the first-class Japanese we find 24-4-1, for a total amount of \$8,874.

Second-class passengers, 19 and 1, \$3,997.50, and third-class Japanese, 243, 34 and 1, for a total of \$16,395.30.

Page number 3 on this voyage shows a record of passengers carried from New York through San Francisco. First-class Japanese, 55—53-2, \$19,433.60 passenger fare. Second-class Japanese, eight persons, \$1640. Third-class Japanese 13-3, \$951.

On page number 4 we have on top of the page in handwriting: "New York tickets validated by San Francisco," and we have from New York to San Francisco, first-class Japanese 29-9-1, which is thirty-odd passengers, for \$8,722. And second-class passengers two, for \$410, and the third-class Japanese passengers, 9, \$607. All records kept by the NYK.

Mr. Saroyan: May I make a statement at this time, Your [34] Honor? For the sake of saving the Court's time I have stipulated to allow that book to go in with the understanding that if there are any

foreign collateral matters there pertaining to something that has nothing to do with the issues in this case—it is a book, one of their records, and it shouldn't be allowed in evidence. Mr. Glicksberg was referring to items that occurred in June. How could items appearing in June have anything to do with this account in October?

Mr. Glicksberg: To show the conduct, what the book contains, the items I refer to in June have nothing to do with this particular case.

Mr. Saroyan: How could sales of passenger tickets in New York——

The Court: They have nothing to do with the issue here involved?

Mr. Saroyan: Mr. Glicksberg, where did you get these documents?

Mr. Glicksberg: From the books and records of the NYK given to the trustee.

Mr. Saroyan: At the time the trustee was appointed?

Mr. Glicksberg: Receiver was appointed.

Mr. Saroyan: Mr. Glicksberg, in order to save time why not give me your next one while discussing that and we can be examining it and that way we can—— [35]

Mr. Glicksberg: Don't rush me, boy.

And then I would like to introduce, if Your Honor please, a "Passage Money Report" which is a record kept by the NYK on all of their voyages, which is executed by the Chief Passenger Clerk, has the seal of the Chief Accountant of the NYK. I wonder whether Mr. Baba can——

Mr. Saroyan: We can stipulate he is a qualified interpreter. Your Honor please, I stipulated to allow some of these documents to go in with the understanding that Mr. Glicksberg is not going to give his explanation.

Mr. Glicksberg: Only going to read from them. I am not——

Mr. Saroyan: I think you have done some explaining. The documents speak for themselves. You have a theory and you apply your theory to each one of these items. You don't bring to the Court's attention each one of these documents you have introduced in evidence has a stamp on it, "Japanese Government-requisitioned ship."

Mr. Glicksberg: I think I have; I have told His Honor several times.

Mr. Baba;——

Your Honor please, in Japan, by the Japanese, instead of signatures they evidently have a seal.

Mr. Baba: That is correct.

Mr. Saroyan: You want to have Mr. Baba sworn as [36] interpreter so he can—might as well do it now and get it over with.

Mr. Glicksberg: Will you be sworn, please?

(Thereupon Robert Baba was sworn to act as Japanese interpreter to interpret from the Japanese language into the English language.)

The Court: Be seated.

Mr. Glicksberg: Stipulate he is qualified?

Mr. Saroyan: Yes, qualified, and the Superintendent furnished him here, stand by so he can

translate any documents that might be necessary.

You want to sit there, Mr. Baba?

Mr. Glicksberg: Can you state to the Court the seal that, third and fourth and fifth pages of that record there? (indicating).

Mr. Baba: Second, third, fourth, fifth—I think it is all right.

Mr. Glicksberg: Do you know the names of the individuals?

Mr. Baba: This stamp is not too clear, but I believe it is Smhima Zaki. It could be Saki, it is the way they pronounce it. Chief Accountant.

Mr. Saroyan: It says chief accountant.

Mr. Glicksberg: The NYK in San Francisco.

Mr. Baba: Port of Embarkation, evidently San Francisco. [37] It says Los Angeles here.

The Court: Speak up so the Reporter can get it.

Mr. Baba: Chief accountant.

Mr. Glicksberg: I would like to introduce, if Your Honor please, this passage money report number 30, Tatuta Maru, Voyage 69-H, point of embarkation from San Francisco as the next exhibit in order, records which came into the possession of the——

Mr. Saroyan: May I interrupt and ask the reporter to read the last statement, the last statement the interpreter made?

(Record read by the reporter.)

Mr. Saroyan: No objection to those documents.

The Court: May be admitted and marked.

The Clerk: Plaintiff's Exhibit 4 admitted and filed in evidence.

(Whereupon the passage money report number 30, above referred to and marked Plaintiff's Exhibit No. 4, was received in evidence.)

Mr. Saroyan: Mr. Glicksberg, are you going to provide us with copies of those?

Mr. Glicksberg: Those that I have copies you can certainly have.

Mr. Saroyan: You have copies of the documents that you have already introduced in evidence? [38]

Mr. Glicksberg: There may be some laying around—some may not.

Mr. Saroyan: I expect to furnish you copies with everything I have; I hope you can reciprocate so we can have a complete record.

Mr. Glicksberg: Unfortunately the trustee is not as wealthy as the Superintendent of Banks, can't afford—give credit for whatever little money we have, have to get an authorization from the Referee in Bankruptcy to have it photostated.

I am reading for the record, if Your Honor please, Plaintiff's Exhibit No. 4, which consists of a passage money report, particularly calling Your Honor's attention to certain captions on various pages.

The first—I will go from the back forward. The first page, for the purpose of the record, the fifth pages, is a "Passage Money Report" of cash collected at Los Angeles, with the record of passengers to Yokohama which shows the total number of

286-39-2, showing \$24,200.80 was collected for passage money.

And then we have a column which says "To be paid at Tokyo" and we have a total in that column of \$5,066.

We then have a column "Five Percent Transportation Tax" which is the tax on—head tax collected at Los Angeles in the amount of \$1,216.85. We have "Stamp tax collected" [39] \$44, and we have a column of "Stamp tax to be paid at Tokyo" showing \$38.50.

We then have a recapitulation which shows that the total amount collected was, total cash, \$25,461.65. And then to be collected at Tokyo, passage money recapitulation of \$2,720, recapitulation of \$2,210, and then \$136 with revenue stamps, making a column to be paid in Japan, \$5,104.50.

On the outside of one of the items of passage money to be collected at Tokyo there is this memorandum "(N.Y.K. staff, Los Angeles) Tokyo cable of August 7, 1941 to Los Angeles account of Messrs. G. Endo and Y. Saiga."

Against the \$38.50, which is the revenue stamps, there is a notation "(N.Y.K. staff, Los Angeles, stamp tax to be paid in Japan.)" And on top of the page is this same stamp, "Japanese Government Requisitioned Ship" stamped on top of it.

Page Number 2 shows point of embarkation San Francisco and the columns are the same, but the heading of the third line—I will only read that—is "New York bookings" and it shows cash collected at San Francisco for Yokohama. I will read totals:

\$8,297, and then we have the next column to be paid at Tokyo, \$13,737.60. Then we have the same columns of five percent transportation tax, the U. S. Stamp Tax collected in San Francisco, \$159.50, and the U. S. Stamp Tax to be paid at Tokyo, \$55.

Page number 3 is captioned "New York tickets validated [40] by San Francisco" and we have no money, but we have a group column passage money which says "to be paid in Japan" and it shows there is a total—first, second and third classes—of 32 and some odd passengers with the amount of \$9,739 to be paid in Japan. We find U. S. Stamp Tax collected on those, the stamp tax under the column to be paid in Japan is a corresponding amount of five percent per head, or \$223.30.

Right below it we have "Return tickets validated by San Francisco." From Yokohama we find a total of first and second class of five for a total of \$1,070.80, with the U. S. Stamp Tax paid here and only one U. S. Stamp Tax to be paid in Japan.

And then we have the recapitulation of the number and the amount of money to be paid in Japan, which includes the amount of money to be paid in Japan, and also the tickets which have been validated the value of the tickets of \$10,809.80.

On page 4 we have similar passage from San Francisco which reads as follows. I will refrain from reading the numerical numbers, but shows for Yokohama destination 363-40-3. Passengers total cash collected at San Francisco, \$27,290.60. And then in the next column we have to be paid at Tokyo \$13,394.50, and then we have the respective transpor-

tation taxes at San Francisco, the amount due of \$1,374.73, collected at San Francisco \$179.30 transportation tax; to be paid at Japan \$5.50, and the U. S. Stamp Tax to be paid [41] at Tokyo \$49.50.

And then below it we have this memorandum: "Tax on tickets issued favor of H. O. staff and families to be paid in Japan (9 at \$5.50)."

"Tax included in honored New York third class ticket N. Y. No. 2313 favor Reverend L. Hennig."

"Value of passage New York third class ticket N. Y. No. 2313 issued favor Reverend L. Hennig to be paid at Tokyo."

And on top of it we have the stamp "Japanese Government Requisitioned Ship."

The first page is a recapitulation of all of the former which shows the San Francisco booking, total booking of cash collected, passage money collected at San Francisco of \$27,290.60; San Francisco fares to be paid at Tokyo \$13,294.50; honored return tickets on San Francisco booking of \$10,909.80, making a total of \$51,494.90.

On the New York booking we have likewise the passage money collected at San Francisco, \$8,287. We have in the column to be paid at Tokyo, \$13,737.60, making the total passage fares from New York bookings, \$22,024.60.

In the Los Angeles booking we have cash collected at San Francisco \$24,200.80; to be paid at Tokyo, \$5,066, a total of \$29,266.80.

We have then the totals of \$106,568.83 as the total cash and amounts to be collected at Tokyo plus

honored tickets [42] which is the passage money captioned \$102,786.30 from this Tatuta Maru 69-H, which a stamp on top of it, "Japanese Government Requisitioned Ship."

We have then, if Your Honor please, a "Return of Passenger Bookings", a record which came into the possession of the trustee bearing the signature of Taoko, General Manager of the San Francisco branch.

Mr. Baba: This signature I can't read.

The Court: Speak louder.

Mr. Baba: I cannot distinguish this signature, but I believe just the manager signed.

Mr. Glicksberg: These are duplicate captioned sheets called "Return of passenger bookings" the only distinction between the both of them, we found numerous ones of them. One has on top of it "Head office (passenger division)"; the other has a copy for Yokohama—they evidently, I presume, sent out copies of everything to the various offices. Since both are signed, I have no objection of giving counsel a copy.

Mr. Saroyan: If Your Honor please, I am going to object to the admission of this in evidence on the ground that there is no proper foundation laid. How can this document ever help the Court in determining who is the owner of this account, is what I can't understand.

The Court: What is the purpose? [43]

Mr. Glicksberg: Shows the course of conduct of NYK, calling all these bookings as their own funds with returns going to their head office, with monies

collected in Tokyo which we will then prove to Your Honor deposits were collected in Tokyo by the NYK and not by the Empire of Japan and is in the same category as the funds collected here in San Francisco, that will all be tied in together with all the records, records kept by the NYK in the course of conducting their own business.

As a matter of fact, the only thing we have is the—that stamp “Japanese Requisitioned Ship”. I think in the course of business, doing business under the uniform records, Evidenciary Act, we have the right to introduce or to show the course of conduct.

Mr. Saroyan: No testimony or foundation laid before this Court. If Mr. Glicksberg was going to call a witness or bring in a deposition or interrogatories and laid the foundation, possibly some of these might be admissable, but at this point they aren't.

The Court: What is the foundation?

Mr. Glicksberg: The record itself shows the Tatuta Maru Voyage 69 Home sailing from San Francisco November 2, 1941, and it has to do with return of passenger bookings, collections, earnings by way of fares and ties in with both these other records exactly in dollars and cents [44]

Mr. Saroyan: Your Honor, Mr. Glicksberg is trying to use the back door to get in the record interrogatories that were taken in Japan to which approximately 25 of them—after 17—we have good objections to, and if Your Honor was to sustain our objection these documents would not be admissible in evidence.

The Court: I will allow you to present it for the limited purpose of his offer subject to your motion to strike it over your objection.

Mr. Saroyan: On each one that has been introduced in evidence, Your Honor?

The Court: Very well.

The Clerk: Plaintiff's Exhibit 5 admitted and filed in evidence.

(Whereupon the document above referred to, "Return of Passenger Bookings" marked Plaintiff's Exhibit 5, was received in evidence.)

Mr. Glicksberg: Plaintiff's Exhibit, if Your Honor please, I am reading from the one which has the ink notation "Head office (passenger division)". It is a printed form, "Return of passenger bookings" and I would like to read the printed form. On top: "To be sent to the passenger department of the head office immediately after the sailing of each passenger vessel from respective port. No accompanying letter required, unless special circumstances necessitate it." [45]

Then it says "Tatuta Maru, Voyage No. 69 Home, sailing from San Francisco on November 2, 1941, and it shows again where or by whom booked. From New York it shows certain figures, mainly concerned with the earnings and just be repeating myself, Your Honor please, if I read every figure in here, showing one figure of \$9,739, and one figure of \$22,024.60; Los Angeles \$29,266.80; San Francisco \$41,755.90; making the total of \$102,786.30, exactly

checking up with the total on Plaintiff's Exhibit No. 4.

Mr. Saroyan: Your Honor please, I am going to object to Mr. Glicksberg's explanation of all these documents. There is no objection to him reading from the document, but when he starts to compare one against the other and giving his own explanation—I don't think it is fair to the other parties in this case.

The Court: If we are prepared we will finally be able to make a little headway here. I will offer a suggestion; wouldn't it be sufficient, without going into special items, be sufficient for all purposes of this case?

Mr. Glicksberg: I can't tell, maybe later on.

Mr. Saroyan: I think only about a hundred dollars off between the records that your office might show and the amount on deposit in the bank.

The Court: That is the reason I thought possibly you can enter into a stipulation as to the facts in relation to the [46] case that are not in dispute?

Mr. Glicksberg: We are in accord with the amount of money involved, but not in accord with the course of conduct and that is why I am concerning—why Mr. Saroyan is disturbed with my attempt to present the record of the NYK that came into possession of the Trustee. The one to be disturbed is Mr. de Lorimier.

Mr. de Lorimier: I state, Your Honor, there is no foundation laid for any of those exhibits.

The Court: In what respect hasn't the foundation been laid?

Mr. de Lorimier: There has been no foundation laid, just putting documents in here, hasn't laid any foundation at all,—he made his opening statement and that is all.

The Court: All right, and under the condition existing here what foundation can he lay?

Mr. de Lorimier: If he has a deposition, and he has, I presume, the deposition should be forthcoming and the witness should be forthcoming, and then these different exhibits could be put into—before the Court.

Mr. Saroyan: Your Honor please, he is trying to show a course of conduct, Mr. Glicksberg is going to show a course of conduct he must first lay a proper foundation by a witness by interrogatories, or by deposition. After all, he is trying it by merely showing and presenting some documents [47] —reading portions of the documents and giving his explanation. I don't think that is the proper procedure.

Mr. Glicksberg: Your Honor,—

The Court: What foundation can he lay, if any, under the circumstances, if I may inquire?

Mr. Saroyan: He has a witness—he took the deposition—

The Court: Is the witness available?

Mr. Saroyan: No, he had a witness in Tokyo.

The Court: Proceed.

Mr. Glicksberg: Your Honor please, I am merely introducing the records that came into the possession of NYK of actual facts that transpired, merely from the documents. They speak for themselves.

The Court: And the purpose was to indicate a

course of conduct in relationship between the parties.

Mr. Glicksberg: And relationship with reference to the funds of 'Tatuta Maru, which is the basis of the \$66,000 in question.

The Court: Is that clear?

Mr. Saroyan: The Treasury license shows that there was a deposit made, an application made for a license to deposit the sum of \$66,000 in the account, and I cannot understand what he is trying to prove by introducing these documents and reading therefrom.

The Court: He is only—as he has indicated he has got [48] these documents and any question about them being proper documents?

Mr. Saroyan: No, but he says that he is trying to prove, if Your Honor please—he said that he is trying to prove a course of conduct. If he is trying to prove a course of conduct he must first lay his foundation, and this witness lays that foundation. Most of this testimony, in our opinion, is inadmissible, and I think after Your Honor has ruled on this deposition of the witness, the depositions or interrogatories taken from a witness in Tokyo, then Your Honor will determine whether there is any proper foundation laid for the admission of these exhibits.

The Court: Then your objection of it is order of proof, is that it?

Mr. Saroyan: Yes, order of the proof. He is trying——

The Court: Anything you can do in relation to the order of proof?

Mr. Glicksberg: I presume I can proceed with the deposition, but I don't follow counsel in his theory. I have also taken the position on behalf of the Trustee, Your Honor please, that these particular documents speak for themselves and they in themselves show that exactly the funds are the funds and the vessels coming back, and we will then tie into these particular vessels the tickets validated for payment in Japan, were paid by Japan, showing that the NYK in reality [49] is the principal, the owner of the funds, and I can only do that, without having the witness, by the very instruments allowing them to speak for themselves, after we have introduced enough of them to show, Your Honor exactly what was done here. You cannot take one exhibit and say this is entirely immaterial when we attempt to show a course of conduct between the NYK and this particular fund. We have to be able to tie it in from the records that we have here irrespective of the deposition, that exactly is the fund of the NYK to which Mr. Saroyan would have no objection if we are successful.

Mr. Saroyan: Your Honor please, we respectfully submit if we are able to convince the Court that some of these questions, these interrogatories and the exhibits attached are not proper, hearsay, and for many reasons not admissible in evidence, then we will be able to convince the Court that there isn't a proper foundation laid for these,—for admission of these documents in evidence for the simple reason they are incompetent, irrelevant and im-

material, having nothing to do with the issues of this case.

The Court: I anticipated this difficulty at the outset, but I indicated to you that I would allow you to get a record over your objection and a motion to strike, and you are not waiving any of the legal rights. I simplified these matters as well as I could without doing violence to either side.

Mr. Saroyan: With the understanding that Mr. Glicksberg [50] doesn't give his explanation to each one of these documents here as he introduces them in evidence.

The Court: If there is any objection here at all it has to do with the order of proof. I will demand that counsel will yield to any reasonable request in relation to the order of the proof, for I will dissolve what has occurred here sooner or later. During the trial those matters are matters entirely for you gentlemen; I know nothing about your presentation nor the merits.

Mr. Saroyan: Well, in the ordinary course of procedure, Your Honor, Mr. Glicksberg, would call a witness or two and lay a foundation for what he is trying to prove and then introduce these exhibits.

The Court: Let us stop for a moment and analyze for just a moment. The foundation having been laid, any question about these documents?

Mr. Saroyan: I don't think there is.

The Court: All right. Then he says these documents speak for themselves.

Mr. Saroyan: With some of his explanations.

Mr. Glicksberg: I am sorry.

The Court: He can explain anything he wants, but that is the legal problem we are faced with. He is entitled to introduce them showing a course of conduct between the parties in relation to these funds. If that isn't true, [51] why, I will stand corrected.

Mr. Saroyan: Well, I am still not able to understand how he is showing the course of conduct by showing that there were tickets sold in New York. What has that got to do with this account. We have many—if he can show us that money belongs to them merely that the tickets were sold in New York, doesn't necessarily mean this account belongs to the NYK lines.

The Court: I am not saying they do or don't.

Mr. Saroyan: Well, subject to our motion to strike if they can't tie it up later, Your Honor.

The Court: The only way that I can, I can't anticipate what is going to be presented to me here, I can't prejudge these matters, but I do comfort both sides, always try to comfort them with a record, and under my procedure you waive no legal right. It is as simple as that to me. I will stand corrected if I am wrong.

All right, I think maybe a little lunch will cool us all off. We will take an adjournment.

(Whereupon an adjournment was taken to the hour of 2 p.m. this date.) [52]

Afternoon Session, Wednesday, April 11, 1951,
at 2 O'Clock p. m.

Mr. Saroyan: Your Honor please, as far as I can

see there is only one witness that is going to appear in this matter. He is Harold Wilson, Deputy Liquidator. As I understand from Mr. Glicksberg he is going to take most of the afternoon with these exhibits. So if I could I would like to send Mr. Wilson away and have him come back tomorrow morning at ten.

The Court: No objection.

Mr. Saroyan: Stipulate to allow this to go into evidence, Your Honor, without the pencilled notation, Mr. Glicksberg said he made himself and subject to the motion to strike.

The Court: All right.

Mr. Glicksberg: Your Honor please, pursuant to the stipulation we would like to offer in evidence a list of the first, second and third class passengers sailing on the M. S. Tatuta Maru Voyage No. 69 Home sailing from San Francisco, dated November 2, 1941, records which came into possession of the Trustee when they took over the effects.

The Court: Subject matter contained therein already in evidence?

Mr. Glicksberg: The vessel 69 Home——

The Court: What is the necessity of repetition?

Mr. Glicksberg: No, the subject matter—the list—the names of the respective passengers have not been [53] introduced as yet. Those that have returned, up to heretofore we have introduced the numbers plus the returns in monies.

The Court: Very well.

Mr. Glicksberg: Attempt to tie in passengers

upon this particular list, that passage fare has been accepted in Tokyo by the NYK.

The Court: Very well.

Mr. Glicksberg: I might state, if Your Honor please, that this does have stamped upon the first page of it, "Japanese Government Requisitioned Ship."

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 6 admitted and filed in evidence.

(Whereupon the document above referred to, entitled "M. S. Tatuta Maru Voyage No. 69 Home sailing from San Francisco November 2, 1941" marked Plaintiff's Exhibit No. 6, was received in evidence.)

Mr. Glicksberg: We are asking leave, if Your Honor please, to introduce a series of ticket books. They are really cashiers tickets of Nippon Yusen Kaisya, each dated and also a number, some having to do with prior vessels, because they are bound, and others in the same book having to do with the same vessel 69 Home setting forth the name of the steamer and receipt from the particular person and the amount of money received. Some of them, insofar as [54] 69 Home, have the stamp "Japanese Requisitioned Vessel" on the form. We would like to introduce them as a whole, as one exhibit.

Mr. Saroyan: Be willing to stipulate to the admission of the four books in evidence with the understanding that the first ten or twelve or fifteen pages

of book number 1 has nothing to do with Voyage No. 69, not be admitted in evidence.

Mr. Glicksberg: No objection.

Mr. Saroyan: Subject to my—to the motion as previously made.

The Court: They may be admitted and marked.

The Clerk: Plaintiff's Exhibit 7 admitted and filed in evidence.

(Whereupon the four cashiers books above referred to, marked Plaintiff's Exhibit No. 7, were received in evidence.)

Mr. Saroyan: I can't read this.

Mr. Glicksberg: I would like to introduce, if Your Honor please, a cable Mackay Radio, from Tokyo, NYK to the NYK in San Francisco, in Japanese, but it has upon it English translations which came to—which we found thereupon—when I say “we”, which the Trustee found thereupon when the Trustee took over the records and documents. Now, there is—we also did find an American translation which coincides with the English translation as was placed thereupon, so we would like to introduce them both as an original record with the [55] translation although the translation is on the original. I would like to show Your Honor, these are——

The Court: Subject to any correction you wish.

Mr. Glicksberg: Yes.

Mr. Saroyan: Could we ask the translator to look at it? It is just two lines.

The Court: Very well.

Mr. Saroyan: Mr. Baba.

Mr. Glicksberg: This is the translation.

Mr. Baba: This is not—this appears like partly in code and partly in Japanese. It is—they are all names of persons. (Reading in Japanese.)

Mr. Glicksberg: This copy which we found has the code attached to it.

The Court: Let him read both.

Mr. Glicksberg: Perhaps this code——

Mr. Saroyan: You wouldn't be able to tell whether the code is a proper code or not.

Mr. Baba: Without the proper code book I don't know.

The Court: I suggest it go in subject to any corrections you wish to make after you check it.

Mr. Glicksberg: The original records, if Your Honor please.

Mr. Saroyan: Did you read the rest of it?

Mr. Baba: This is Japanese, "Yamada" evidently a [56] person's name, "Shishimoto" is also a person's name. "Kawai" also a person's name, "Ayabe Ishihara", those are all Japanese names. "Boekikumiai" is some trade association, "Tatuta", of course, probably that is "Tatuta Boekikumiai."

Mr. Saroyan: Mr. Baba, can I ask you a question through the Court? What is that cable, isn't it like as if it were arranging passage; first class passage for two people and second class passage for four?

Mr. Baba: I don't know; I didn't take a good look at it.

Mr. Glicksberg: Your Honor please, I am introducing an original exhibit with the translation by

the NYK which we found from their own code attached to it.

The Court: What is the purpose of the offer?

Mr. Glicksberg: It reads as follows: "Telegraphic cable from Tokyo to San Francisco dated October 23, 1941, Number 80. Have collected \$1200, \$95 first class passage Yamada Shishimoto" the names "Second class passage Kawai Ayabe Ishihara Boekikumiai Tatuta Maru from San Francisco to Yokohama. Yusen."

Mr. Saroyan: Same objection I made before, Your Honor, and not only that, there is a further objection here I don't know what that thing means. We don't have the code here.

Mr. Glicksberg: If Your Honor please I don't know why we are faced with the same objection time after time. The copy which I have in my hand was attached to the original. The original has English translations, the copy has a code. [57]

Mr. Saroyan: That is a darned good code.

Mr. Glicksberg: —of the NYK whereby they translated their own coded messages.

Mr. de Lorimier: But we haven't got the code.

Mr. Glicksberg: No, but that gives their translation and that is all we are interested in presenting to the Court.

Mr. de Lorimier: I believe the Court should have the code, otherwise I'm——

The Court: Well, now, I think we are talking about something that probably won't affect the issues in this case.

Mr. de Lorimier: I think so too, Your Honor.

The Court: The sum total of this telegram is somebody wanted a certain amount of money.

Mr. Glicksberg: Tokyo.

The Court: Yes.

Mr. Glicksberg: And they are wiring them and booking passage. We will show from the physical record these people took passage under the booking from Tokyo.

The Court: I don't think there is any question.

Mr. Saroyan: Subject to the same motion. The only thing, I can't stipulate to something I don't know what the code reads——

The Court: Subject to correction.

Mr. Saroyan: How would I be able to correct it?

Mr. Glicksberg: Only find the records. [58]

Mr. Saroyan: They have to furnish the code, it is their company.

Mr. Glicksberg: There is their code itemization on it.

Mr. Saroyan: Only typing, typewriter—I don't know whether that is copied from the code or not.

Mr. Glicksberg: We found this in the records of the NYK with its translation.

The Court: Let it go in, admitted next in order for what it is worth and I am not prepared to say at this time whether it is worth very much to the issues involved here.

The Clerk: Plaintiff's Exhibit 8.

The Court: What is that?

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Whereupon the telegram above referred to, together with the translation attached, marked Plaintiff's Exhibit 8, were received in evidence.)

The Court: I might suggest that cluttering this record serves no useful purpose. I say that advisedly. Proceed.

Mr. Glicksberg: We have a cable here with the coded translation by the NYK from Tokyo to the NYK in San Francisco which purports to likewise have to do—has to do with the Tatuta Maru booking of passengers in Tokyo which I would like to introduce as the next exhibit.

Mr. Baba: This is likewise a code, partly in code and partly in Japanese. You wish, Mr. Glicksberg, you want me to [59] read the Japanese here?

Mr. Glicksberg: No. I would like to introduce, and both subject to any correction Mr. Baba may make on it of any translation which the NYK has translated, has the date of receipt October 25, 1941.

The Court: What will the code mean to me?

Mr. Glicksberg: The code means nothing, if Your Honor please, but the translation by the NYK indicates their own coded translation.

Mr. de Lorimier: Yes, Your Honor, supposed to have that code, hearsay evidence.

Mr. Glicksberg: If Your Honor please, these are business records as to the character or weight they may bear with Your Honor; interpretation is a matter for Your Honor. We found these records, and found their interpretation by the NYK here.

The Court: Be admitted next in order.

The Clerk: Plaintiff's Exhibit 9 admitted and filed in evidence.

(Whereupon the cablegram above referred to, together with the translation attached, marked Plaintiff's Exhibit 9, were received in evidence.)

Mr. Glicksberg: Plaintiff's Exhibit 9, Your Honor please, is directly connected up with Plaintiff's Exhibit No. 8. Number 8 refers to Number 80; Number 9 is Number 81, and according to the translation which we found reads as [60] follows:

"Number 81. We are collecting first-class passage for Mr. Toyoro Yamashita, Mrs. Katsumi Sawada, and two children, Yamashita Kisen Tatuta Maru from San Francisco to Yokohama telegraph how much shall we collect full stop" The rest of it has to do with, something about another vessel.

Mr. Saroyan: Let the record show, Your Honor, we were in the dark as far as that statement Mr. Glicksberg just read. We have no code, don't know whether the statement he read, or whatever he finds here is on that typed sheet or not and no one in the courtroom that could do it.

The Court: I allow wide latitude in relation to admissibility of evidence, but I tried to indicate here we are cluttering this record with matters that I don't think has any relation to the issues in this case. It is conceded they took passage and compensated for them and what their names may be. How does it enter into the merits of this case?

Mr. Glicksberg: Shows, Your Honor please, the

collection by the NYK in Tokyo of monies and definitely negatives the question, the basic issue here as to whose money the fares of the passengers from the requisitioned vessel belongs to, because if it were Japanese requisitioned vessels, the money would not be paid in Tokyo for the same identical voyage from San Francisco to Tokyo. [61]

Mr. Saroyan: The issue before the Court, Your Honor, is who owns the account in the Yokohama Bank, what arrangements were made for the deposit, what licenses were obtained, who made the disbursements from the account and what is the balance in the account; it is the issue before the Court, not the passenger list or coded cables in regard to four passengers from Los Angeles to Tokyo or New York to San Francisco. I can't see that is going to decide this case.

Mr. Glicksberg: Your Honor please, my answer to that is, if I must answer, we concede that the very things Mr. Saroyan says happened on the face of it and did happen, that Yoshio Muto had it in his name, Yoshio Muto received the license, Yoshio Muto received a license to put the funds in his account and the money is still standing in Yoshio Muto and insofar as Mr. Saroyan's claim is concerned definitely he is in a position to state as far as that is concerned it is in Yoshio Muto's name.

Now, it is quite conceivable, much to the contrary of Mr. Saroyan's interruptions, that the Empire of Japan and the NYK have an arrangement that this money belongs to the NYK, although it is standing in the name of the Consul General Yoshio Muto, and

The Clerk: Plaintiff's Exhibit 9 admitted and filed in evidence.

(Whereupon the cablegram above referred to, together with the translation attached, marked Plaintiff's Exhibit 9, were received in evidence.)

Mr. Glicksberg: Plaintiff's Exhibit 9, Your Honor please, is directly connected up with Plaintiff's Exhibit No. 8. Number 8 refers to Number 80; Number 9 is Number 81, and according to the translation which we found reads as [60] follows:

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Now, it is quite conceivable, much to the contrary of Mr. Saroyan's interruptions, that the Empire of Japan and the NYK have an arrangement that this money belongs to the NYK, although it is standing in the name of the Consul General Yoshio Muto, and

therefore all these circumstances and of these arrangements which are then evidenced by the actions of the particular parties become,—be and become relevant as against the claim of the Alien Property Custodian as to whose [62] money it is, whether it belongs to the empire of Japan or whether it belongs to the NYK creditors in San Francisco. That is the sole purpose. We are producing, first of all, a series of conduct negating any theory because if monies were belonging to the Consul or to Japan, the conduct of NYK in Tokyo or the conduct of NYK here where it booked passage and gave certificates and received money without putting it in the Consular account or the Empire of Japan account would be contrary to the conduct of the parties and definitely show NYK has the title in this money. Our fight here, if any can be called such, is only between the Alien Property Custodian and Mr. Sterling Carr, two officers of the Court, one for the creditors and one for the Alien Property Custodian.

Mr. Saroyan: There is a contractual relationship between the Japanese Government in Japan and NYK that might have ripened into any sort of transaction, would have been a debtor-creditor relationship between the two. And insofar as going into the record that shows NYK lines has any interests whatsoever in the account that has been deposited in this bank in October by Yoshio Muto, even though a remittance from Japan in the sum of \$39,000 and further \$68,000 added to it by Yoshio Muto, and he got licenses from the United States

Treasury to make those deposits and got licenses to make fifty-eight disbursements with one disbursement to NYK Lines [63] of \$4,771.

Mr. Glicksberg: I concede that argument can be made at the end when all of the exhibits are in and all the conduct is before this Court. I think we can connect it up. We will definitely show to Your Honor the course of conduct from which Your Honor can determine who has title to that money as between the creditors in California or the Alien Property Custodian of Washington. That is what we are concerned with.

Mr. de Lorimier: Let me ask you this——

Mr. Glicksberg: Let me go ahead, Mr. de Lorimier.

Mr. de Lorimier: I thought you were through.

Mr. Glicksberg: Through?

Mr. de Lorimier: Through with that sentence.

Mr. Glicksberg: I want to introduce now——

Mr. de Lorimier: Pardon me, I was looking at——

Mr. Glicksberg: I would like to introduce a copy of a cable which San Francisco sent to Tokyo October 25.

The Court: Who in San Francisco?

Mr. Glicksberg: NYK, San Francisco, to NYK, Tokyo, particularly because it is connected in answer to this cable 81 which we have just introduced in evidence. It is in English, with a Japanese translation underneath. Fortunately from the records which the Trustee found the Japanese first had a draft of a telegram, then they had it coded, and then they had the telegram itself. [64]

Mr. Saroyan: Same objection, Your Honor.

The Court: Same ruling. I will give you a record on the matter.

Mr. Glicksberg: Introducing this copy of a cable from San Francisco, October 25, to Nippon Yusen Tokyo from Yusen, which is NYK, San Francisco, as the next Exhibit in order which reads as follows:

“Number 47 referring to your telegram number 81 passage money prepayment arranged with Japanese Consulate will advise you later amount to be collected at your end.”

Then there are other matters about Matumura.

The Clerk: Plaintiff's Exhibit 10 admitted and filed in evidence.

(Whereupon the cablegram above referred to, dated October 25, 1941, marked Plaintiff's Exhibit No. 10, was received in evidence.)

Mr. Saroyan: Same objection, same type of coded message, Your Honor, pertaining to \$680 transaction.

The Court: Same ruling.

Mr. de Lorimer: Same objection.

Mr. Glicksberg: Like to introduce the original of a message received from Tokyo by NYK, San Francisco, from NYK Tokyo dated October 27, with its coded translation in English and in Japanese as the next exhibit in order. Like to read it [65] for the record. It has to do with the previous number 82.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

(Whereupon the radiogram above referred to, dated October 27, 1941, marked Plaintiff's Exhibit No. 11, was received in evidence.)

Mr. Glicksberg: "Have collected \$680 first-class passage for Messrs. Koda Fujisawa Bank of Japan Tatuta Maru from San Francisco to Yokohama."

The Court: These are all collections in Japan?

Mr. Glicksberg: That is correct, on the Tatuta Maru and these people sailed on the Tatuta Maru.

Mr. Saroyan: Just a minute, Your Honor. Your Honor asked whether they are all collections?

The Court: In Japan.

Mr. Saroyan: In Japan. That is a conclusion—Mr. Glicksberg doesn't know that.

The Court: I just asked him a question; I will make a determination on that.

Mr. Saroyan: You don't have any evidence on that.

Mr. Glicksberg: Want me to testify? When I was in Japan I found they had received them.

Mr. de Lorimier: Then maybe you better testify.

Mr. Glicksberg: Likewise we have a subsequent cable Number 83 which follows in rotation from Tokyo to San Francisco, [66] NYK. Like to offer in evidence, subject, of course, to the objection, same objection that all concerned the original cable, with the English translation thereupon plus the copy of NYK's San Francisco with the code and their English translation as the next exhibit in order and I would like to read the translation in evidence.

Mr. Saroyan: The record will show the same objection.

The Court: Let the record so show.

The Clerk: Plaintiff's Exhibit 12 admitted and filed in evidence.

The Court: The objection is overruled subject to the motion to strike over the objection of counsel.

(Whereupon the radiogram above referred to, dated October 30, 1941, marked Plaintiff's Exhibit 12, was received in evidence.)

Mr. Glicksberg: Dated October 30, telegram received in San Francisco from Tokyo, "Number 83. For Mrs. Ycaza diplomatic have collected \$332.35 first-class passage from San Francisco to the Yokohama Tatuta Maru."

The Court: What does the Number 31 indicate?

Mr. Glicksberg: Number 83.

The Court: Oh, 83.

Mr. Glicksberg: That is the next cable in rotation. Each cable had a number coming and going.

The Court: Where does the number originate from? [67]

Mr. Glicksberg: Evidently that is the next number of the cable.

The Court: I see.

Mr. Glicksberg: They keep them by cable numbers when they answer. Each one of these are in reference to a particular number of a cable.

I would like to introduce, if Your Honor please, a carbon copy of a cable sent November 2, 1941, from NYK San Francisco to NYK Tokyo which has—it is coded and has its English translation as one of the records which we found bearing on the par-

ticular subject as the next exhibit in order.

The Court: It may be admitted and marked.

Mr. Saroyan: Same objection. Further objection, Your Honor, to this only a——

The Court: Copy?

Mr. Saroyan: Only a copy.

Mr. Glicksberg: The original is in Tokyo. This is one sent from San Francisco to Tokyo.

The Court: Be able to establish the original is in Tokyo?

Mr. Glicksberg: I have this carbon copy which reads as follows:

Telegram dispatched from San Francisco November 2, 1941, to Tokyo via Mackay——

The Court: Still a copy. [68]

Mr. Glicksberg: That is right, and a business record.

Mr. de Lorimier: Hasn't been certified to.

Mr. Glicksberg: It can't be certified to, it is a record of this company, this company sends it.

Mr. Saroyan: Your Honor, I want to object, there is a certain——

Mr. de Lorimier: Second hand hearsay.

The Court: To sober us all I will sustain the objection.

Mr. Glicksberg: Your Honor please, I would like to make an offer of proof for the record.

The Court: Certainly.

Mr. Glicksberg: And I would like to have this instrument, which is a carbon copy of a purported telegram from San Francisco to Tokyo dated November 2, which reads as follows:

“Number 52. Tatuta Maru sailed today first and second class passengers 154 61 third class passengers 600 dollars 103 thousand dollars (\$102,582) Kumanomido family Hirakawa Muraoka” and a series of other names are on board. “No mail. Many thanks for all arrangements made.”

I would like to offer this in evidence and have it identified as having been tendered in evidence.

The Court: All right.

The Clerk: Plaintiff's Exhibit 13 marked for identification. [69]

(Whereupon the copy of the telegram above referred to, dated November 2, 1941, was marked Plaintiff's Exhibit 13 for identification.)

Mr. Glicksberg: That is right. Like to introduce, if Your Honor please, an original cable bearing the English translation, notations thereupon, plus the carbon copy translation of the code and the translation of a cable which we found in the records of the NYK, San Francisco, purportedly coming from Tokyo to San Francisco having to do with the Tatuta Maru. Like to introduce it next in order.

Mr. Saroyan: Same objection, Your Honor.

The Court: Same ruling.

The Clerk: Plaintiff's Exhibit 14 admitted and filed in evidence.

(Whereupon the cablegram above referred to, dated October 14, marked Plaintiff's Exhibit 14, was received in evidence.)

Mr. Glicksberg: I would like to read this for the record. Telegram received in San Francisco October 14, 1941, from Tokyo:

“Number 74 for homeward voyage Quote present rate no reduction except published stop contemplating improvising additional third class berths Tatuta Maru 200 Hikawata Maru 200 Taiyo Maru 165 if diplomatic negotiations successful removal navigation laws [70] restrictions reduced rates Tatuta Maru Hikawata Maru \$55 Taiyo Maru \$40 will advise when fixed Seattle Honolulu have been advised stop please guarantee adequate accommodation for two government representatives one Sirokiya one additional doctor one J.T.B. Tatuta Maru fullstop.

“Render all possible assistance to Mrs. Megata Mr. Okamoto both of Okura Shoji New York fullstop have collected \$340 first class from San Francisco to Yokohama for Mrs. Shinzo Kawai Boeki Kumiai fullstop.” The rest of it has nothing to do with it.

Mr. de Lorimier: I don't see there is any relevancy in that telegram, Your Honor; whatever it is doesn't seem to have any relevancy to this case at all.

The Court: Only that there is a payment of \$300.

Mr. Glicksberg: Plus the diplomatic arrangements to be made.

Mr. de Lorimier: The diplomatic arrangements have to be taken up later, I guess; I don't believe that comes——

The Court: I don't know whether we will have any diplomatic relations following this testimony or

not, but at the present time it is just a conclusion.

Mr. de Lorimier: Yes.

Mr. Saroyan: I don't want to interrupt—I can't see the relevancy of this cable to the question of who owns this [71] bank account.

The Court: I can't either, but I am giving him a record so if I have done violence you will have an opportunity to assert it.

Mr. de Lorimier: We object the same as he is.

The Court: Let the record show your objection. Going in subject to motion to strike over objections so you waive none of your legal rights at all. I use this method in the interests of time, but I am not prepared to say that I am making much headway.

Mr. Glicksberg: I would like to introduce, if Your Honor please, a passage ticket counterfoil of the records of the NYK which were found in the NYK. The number is No. 90286 which has to do with the—has the stamp of “Japanese Government requisitioned ship” thereupon, as one of the records which came into the possession of the trustee at the time he took over.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's exhibit 15 entered and filed in evidence.

(Whereupon the document referred to, passage ticket No. 90286, was received in evidence and marked Plaintiff's exhibit No. 15.)

Mr. Saroyan: Same objection.

Mr. de Lorimier: Same objection.

Mr. Saroyan: Subject—— [72]

The Court: Let the record show the same ruling.

Mr. Glicksberg: This, if Your Honor please, reads as follows: The name of the passenger Mr. Toshitoha Yamauchi. On top then it has total fares one from San Francisco to Yokohama, the vessel Tatuta Maru, sailing date 11-2-41. Class, second class. Cabin and berth 262-B. On top of the other side it has "Ticket dated March 28, 1941. Remarks: Ticket called for fare Los Angeles to Yokohama value \$183.50. Adjustment to be made by the home office." The value of the ticket is \$183.50 and passenger furnished \$179.50.

The Court: Is this an additional passenger?

Mr. Glicksberg: It is a passenger that went on this vessel on a ticket which he had in his possession March 28, 1941, and was afforded passage on this Japanese requisitioned vessel without the payment of any money at all.

The Court: It may be admitted and marked next in order.

Mr. Glicksberg: Another passage ticket, TK90311, which is a similar situation.

The Court: It may be admitted and marked.

Mr. Saroyan: Your Honor please, it won't be necessary for me to make any objection?

The Court: Your objection will run to all of this testimony.

The Clerk: Plaintiff's exhibit No. 16 admitted and filed in evidence. [73]

(Whereupon the document referred to, ticket No. TK90311, was received in evidence and marked Plaintiff's exhibit No. 16.)

Mr. de Lorimier: My objection runs, too.

The Court: The record will so show.

Mr. Glicksberg: This likewise reads, the name of the passenger Mr. Juiji Kasai, one fare from San Francisco to Yokohama, vessel Tatuta Maru, sailing date November 2, 1941. The value of the ticket is \$243.30 @ 23 7/16 yen issued against D. R. NX No. 29185, valued at \$141.60, which is an old ticket of the NYK.

I would like to introduce an original letter in English from the passenger division, manager, America Department, at Tokyo, dated October 15 to the manager of Nippon Yusen Kaisya, with a certain ticket attached to it as the next exhibit in order.

The Court: It may be admitted and marked.

The Clerk: Plainiff's exhibit 17 admitted and filed in evidence.

Mr. de Lorimier: Was that 17?

The Clerk: 17.

(Whereupon the letter referred to, dated 10/15/41, was received in evidence and marked plaintiff's exhibit No. 17.)

Mr. Glicksberg: This reads as follows:

“Tokyo, October 15, 1941.

The Manager, Nippon Yusen Kaisya, San Francisco. [74]

“Dear Sir:

“Mr. Kensaku Maeda, ticket No. B-TK-90500 first class San Francisco/Yokohama ‘Tatuta Maru’ 69-home ‘passenger list’.

“Please refer to telegram No. 74 of October 14, 1941, in regard to the above passenger.

“In issuing ticket No. A-TK-90500 and B-TK-90500 on behalf of the above passenger, who is traveling on the ‘Tatuta Maru’ voyage 69-Out and returning on the same trip, we have endorsed the B-portion of the ticket as per attached counterfoil, so we shall appreciate if you will kindly make the P/L for this passenger and forward the same to the ship.

“Thanking you for your cooperation we are,

“Yours faithfully,”

Mr. Saroyan: I understand this, Your Honor, is made in the passage list?

Mr. Glicksberg: What is that?

Mr. Saroyan: Which is made in the passenger list.

Mr. Glicksberg: It speaks for itself.

I’d like to introduce, if Your Honor please, a copy of a letter on the stationery of NYK San Francisco addressed to passenger division of the NYK, president of NYK, Tokyo, consists of two pages with a signature on the carbon copy and a carbon copy of the passenger list. [75]

The Court: I repeat again I think this record is being cluttered.

Mr. Glicksberg: That may be so.

The Court: I will sustain the objection so that you may have a record.

Mr. Glicksberg: I would like to make an offer of proof, then, if Your Honor please, for the record and offer to introduce this passenger list covering

New York reservation notes honored at this office at San Francisco for passage on the Japanese government requisitioned ship, listing in total as one of the passengers the amount that was paid in San Francisco, the passage money to be collected in Japan and likewise the remarks attached thereto as an original record, as a copy of an original record which was forwarded to Tokyo pertaining to the Tatuta Maru as evidencing certain passengers that went on board this vessel without payments, payments were to be made to Japan from records here as substantiated by this document and——

Mr. Saroyan: Just a moment.

The Court: He is going to be heard.

Mr. Saroyan: Excuse me.

Mr. Glicksberg: And other passengers having received passage on this vessel, passengers listed in this exhibit which I am offering to introduce as having made payments in New York and have gone and have been afforded passage on this [76] trip, the Tatuta Maru 69-Home.

The Court: Assuming that to be true, what relation has it to the issues here involved?

Mr. Glicksberg: It is a course of conduct showing that the NYK really operated the vessel as its own and the funds which were the proceeds from its operation, the \$68,000 were funds belonging to NYK, because of the conduct if this were a vessel which was operated by Japan, this course of conduct could not be pursued, because all of the monies would have to go to the Empire of Japan.

The Court: There is no question about these passengers going on these ships?

Mr. Saroyan: No question about that, Your Honor. Every document so far he has introduced says it is a Japanese requisitioned ship, which means the ship was being operated by the Japanese government.

The Court: I understand that.

Mr. Glicksberg: No question.

The Court: Now, these various documents entered this morning, doesn't it cover those passengers there?

Mr. Glicksberg: Some do and some don't. This is a——

The Court: That is the reason I have indicated we are just cluttering this record.

Mr. Glicksberg: But this is a summary of the New York transaction with—— [77]

The Court: In the interest of time the summary may go in for all of the persons so that we won't deny you any legal right in this matter, give you a record on it, but it is going in subject to motion to strike over the objection of counsel.

Mr. Saroyan: Your Honor sustained the objection to plaintiff's exhibit 18, have you? You are changing your ruling on that, going in subject to the motion to strike?

The Court: Yes.

The Clerk: Plaintiff's exhibit 18 admitted and filed in evidence.

(Whereupon the letter referred to, dated November 14, 1941, with attachments, was received in evidence and marked plaintiff's exhibit No. 18.)

The Court: The only reason I change my view on that, he said it was a summary of what was going on before. Whether it is or not, I don't know, and I don't know if I'll ever know.

Mr. de Lorimier: Is this admitted as an exhibit or for identification?

The Court: It is in evidence subject to motion to strike over the objection of counsel.

The Clerk: Plaintiff's exhibit No. 18 admitted and filed in evidence.

The Court: So counsel will have an opportunity to get their documents together and familiarize themselves with them, we will take a recess.

(Short recess.) [78]

Mr. Glicksberg: Your Honor please, I would like to introduce a series of applications made to the NYK for travel on the Tatuta Maru, each one particularly bearing a notation on the application as to where the passenger's money was to be paid in Japan or as to whether or not it had been paid in Japan, on ticket which had been issued or made up, issued on a previous ticket for a redemption on this application. I would like to introduce them as one exhibit so that we can refer to it at any time without reading each of the particular applications.

Mr. Saroyan: Same objection. All he has is a so-

called passenger's identification. I don't know how that is going to decide this case. Each one of the applications pertains to passenger or family, and whether the money was paid in Japan or in the United States is incompetent, irrelevant and immaterial so far as the issues in this case are concerned.

Mr. Glicksberg: That is the very issue we decided upon.

The Court: I will allow it. Mark it as an exhibit.

(Whereupon series of travel applications was marked plaintiff's exhibit No. 19 in evidence.)

Mr. Glicksberg: Your Honor please, we have certain documents in Japanese which in 1941 and 1942 had been translated by Koreans. The Koreans are not here. We will give them today to Mr. Baba to see if he can interpret them, and we would like to defer proceeding with them at this particular moment, but [79] introduce them after he has had an opportunity to examine them and interpret them.

The Court: All right.

Mr. Glicksberg: We would like at this time, if Your Honor please, to proceed with the deposition taken in Tokyo. We have copies, Your Honor. I think we all have copies. May the record show that the original deposition was returned, I think, to the clerk in the proper office acknowledged to take the deposition and have the interrogatories to the depositions propounded in Tokyo.

The Clerk: Those are all tied together. You will have to tell the Judge which one you want.

Mr. Glicksberg: If Your Honor please, pursuant

to interrogatories which were propounded by the plaintiff in this action direct to a certain witness, Seishi Hiroyoshi, in Tokyo; and further cross-interrogatories propounded by the defendant, and subsequent changes and then, after questions, argument thereupon, Your Honor settled these interrogatories and they were forwarded to Glen Bruner, Consul of the United States of America in Tokyo, Japan; and commission was issued to the consul in Tokyo to have the witness appear, and have the said witness, Seishi Hiroyoshi, answer certain questions which Your Honor has approved. I think there will be no questions, but it may be stipulated that the return of the consul was made to the Court. [80]

Mr. Saroyan: You mean the original?

Mr. Glicksberg: Original was returned and is placed in the custody of the Court.

Mr. Saroyan: Yes.

Mr. Glicksberg: And there are considerable exhibits attached thereto or included in the said deposition. For the record I would like to read——

The Court: Dated December 14th on the file?

Mr. Glicksberg: Well, the interrogatories were filed December 14th.

The Court: Yes.

Mr. Glicksberg: I would like to read the caption of the return by Glen Bruner, the commissioner appointed by this court.

“CAPTION”

“Deposition of witness taken before me, Glen Bruner, Consul of the United States of America at

Tokyo, Japan, on January 23, 1950, under and by virtue of a commission issued out of the United States District Court for the Northern District of California, Southern Division, in a certain cause pending therein and at issue between Sterling Carr, Trustee of the estate of Nippon Yusen Kaisya, a corporation, Bankrupt, Plaintiff, and the Yokohama Specie Bank, Ltd., of San Francisco, a foreign corporation, et al, defendants." [81]

The Court: I am trying to locate that deposition. I haven't it here. Oh, I have it now.

Mr. Saroyan: That is the one.

Mr. Glicksberg: Paragraph 2:

"It appearing that the witness, Seishi Hiroyoshi, formerly of No. 1 Urashima-ga-oka, Kanagawa Ku, Yokohama, Japan, but presently residing at No. 2177 Shinohara-Cho, Kohoku Ku, Yokohama, Japan, while understanding some English, could not intelligently testify in the English language but did well understand the Japanese language, one Tetsuo Nukazawa, who also well understands the Japanese language, was employed as interpreter and was sworn as follows:

"You, Tetsuo Kukazawa, do solemnly swear that you know the English and Japanese language **and** that you will truly and impartially interpret the oath and interrogatories to be administered to Seishi Hiroyoshi, a witness now to be examined, out of the English language into the Japanese language, and that you will truly and impartially interpret the answers of the said Seishi Hiroyoshi thereto,

out of the Japanese language into the English language, so help you God;

“And the said Tetsuo Nukazawa interpreted accordingly. [82]

“The interrogatories and the cross-interrogatories were by me read to the said witness and the answers of the said witness to the said interrogatories and cross-interrogatories were by me taken down in writing, and the said written answers, being then read over correctly to the said witness by me, were then signed by the said witness in my presence.”
On page 3:

“Answers to direct interrogatories. The witness, Seishi Hiroyoshi, whose former business address was c/o Nippon Yusen Kaisha, Head Office, 7 Kabuto-cho 1-chome, Nihombashi, Chuo Ku, Tokyo, Japan, first being duly and publicly sworn to tell the truth, the whole truth, and nothing but the truth relative to all matters to be inquired of in this proceeding, testified and deposed as follows in answer to the interrogatories and cross-interrogatories filed by counsel to the said parties in this cause and made a part hereof: direct interrogatories.”

Mr. Glicksberg: I shall first read the interrogatories, if Your Honor please, and then read the answer. Is that satisfactory?

Mr. Saroyan: Yes, that is all right.

Mr. Glicksberg: (Reading):

“Interrogatory No. 1: What is your name? [83]

“Answer to the first interrogatory, he saith: Seishi Hiroyoshi.

“Interrogatory No. 2. Where do you reside?

“To the second interrogatory he saith: No 2177 Shinohara-Cho, Kohoku Ku, Yokohama, Japan.

“Interrogatory No. 3. Prior to December 3, 1941, where did you reside?

“To the third interrogatory, he saith: Long Island, New York.

“Interrogatory No. 4. Where were you then employed?

“To the fourth interrogatory, he saith: Nippon Yusen Kaisya, New York Branch Office.

“Interrogatory No. 5. In what capacity?

“To the fifth interrogatory, he saith: Assistant accountant.

“Interrogatory No. 6. Prior to your affiliation with Nippon Yusen Kaisya, what was your occupation?

“To the sixth interrogatory, he saith: Attended college at Keio University, Tokyo, and graduated in 1931 with a Bachelor of Arts degree, majoring in economics.

“Interrogatory No. 7. After graduation from college what did you do?

“To the seventh interrogatory, he saith: Became a member of the Nippon Yusen Kaisya, accounting [84] department, in the year 1932.

“Interrogatory No. 8. Can you read and write English?

“To the eighth interrogatory, he saith: Yes, but only to a limited degree, and depending on the time allowed me to read and write.

“Interrogatory No. 9. When did you return to Japan?

“To the ninth interrogatory, he saith: August 20, 1942.

“Interrogatory No. 10. Commencing with August 20, 1942, where were you employed?

“To the tenth interrogatory, he saith: Immediately returned to employment with the Nippon Yusen Kaisya, Tokyo Office, accounting department.

“Interrogatory No. 11. Thereafter, did you sever your connection with Nippon Yusen Kaisya?

“To the eleventh interrogatory, he saith: Yes. In February 1945 I was drafted into the Japanese Navy and remained with the navy until August 24, 1945.

“Interrogatory No. 12. After your discharge from the Japanese Navy, by whom were you employed?

“To the twelfth interrogatory, he saith: I remained with the Japanese Navy until August 24, 1945, after which I returned to employment with Nippon Yusen Kaisya, Tokyo Office, and am still nominally in their employ and have the rights of an employee.

“Interrogatory No. 13: What positions did you hold [85] with Nippon Yusen Kaisya, Tokyo Office, from 1942 to the present date, exclusive of the period when you were in the Japanese Navy?

“To the thirteenth interrogatory, he saith: For six months I was employed as assistant clerk in the General Affairs Department of the Finance Division. After that I was manager of that same department until August, 1949, whereupon I became a member of the reserve staff, and was detailed as Managing Director to Yokohama Boeki Tatemono

Kabushiki Kaisha (Yokohama Traders Building).

“Interrogatory No. 14: What are your duties as such manager of the General Affairs Department of the Finance Division of Nippon Yusen Kaisya, Tokyo Office?

“To the fourteenth interrogatory, he saith: Until my transfer to Yokohama it was my duty, as head of the General Affairs Department of the Finance Division, to take general care of all finance matters, reducing such matters to written form, and then having actual custody and control over all pertinent documents and papers. I, myself, did not do any of the accounting work.

“Interrogatory No. 15: In your capacity as Manager of the General Affairs Department of the Finance Division of Nippon Yusen Kaisya, Tokyo Office, have you any records of the company which pertained to a special account standing in the name of Yoshio Muto, Consul General of [86] Japan, in Yokohama Specie Bank, Limited, of San Francisco, California, showing a balance of \$66,892.65 as of December 7, 1941?

“To the fifteenth interrogatory, he saith: I have here records of the Nippon Yusen Kaisya, Tokyo Office, which contain reference to a special account standing in the name of Muto, Consul General of Japan, with the Yokohama Specie Bank, Limited, of San Francisco, California, but fail accurately to show the balance of that account as of December 7, 1941.

“Interrogatory No. 16: When did you first become acquainted with such records?

“To the sixteenth interrogatory, he saith: I first became acquainted with these records during or about the month of May, 1943 after I had become Manager of the General Affairs Department of the Finance Division, Tokyo head office, Nippon Yusen Kaisya.

“Interrogatory No. 17: Was this the first information you had of the existence of said account?

“To the seventeenth interrogatory, he saith: Yes.

“Interrogatory No. 18: Do any of the records of Nippon Yusen Kaisya, Tokyo Office, in your possession refer to such special account of Yoshio Muto in the Yokohama Specia Bank, Limited, of San Francisco, showing a balance of \$66,892.65 as of December 7, 1941? [87]

“To the eighteenth interrogatory, he saith: Those figures, as such, do not appear in the records in my possession. However, similar figures are found, namely, \$66,638.25, in the account of Muto, the Consul General of Japan at San Francisco. This figure was reached after consultation among officials of the Foreign Ministry and officials of the Nippon Yusen Kaisya, of whom had returned from the United States on the exchange ship, Asama Maru. This was occasioned by the fact that the officials concerned had not been permitted to bring with them from the United States the complete records pertaining to this matter.”

Mr. Saroyan: May it please the court, here is a point where I would like to interrupt. We have no objection to interrogatories one to seventeen, inclusive, merely wishing to call attention to two facts

that will be possibly basis of objections that I will make: First, that Mr. Hiroyoshi did not return to Tokyo until August, 1942, or eight months after Pearl Harbor; and, secondly, he said he had no knowledge or record until May, 1947, when he was placed in charge of the accounting division.

My first objection is to interrogatory eighteen, the interrogatory and the answer—the interrogatory itself and the answer, our interrogatory—our objections, rather being, first, it is a compound question; secondly, assumes something [88] not in evidence; thirdly, based on hearsay testimony.

The answer given states that the records of NYK show an account of Yoshio Muto, Consul General, in the sum of \$66,638.25, and this figure was reached after NYK and the Japanese Foreign Ministry held a conference. How could this witness testify to that statement? He wouldn't know that.

We object to the entire answer after the first sentences on the ground that it isn't responsive to the question; in other words, mere conclusions and opinions of the witness, based on hearsay testimony.

As to the first two sentences of the answer, we don't believe it is the best evidence. The best evidence is the record itself. In answer eighteen, the first line, first statement he makes: "Those figures, as such, do not appear in the records in my possession." How can he continue with his testimony when he said, "That doesn't appear in the records in my possession"? However, as the result of a conference that was had, a figure was reached between the Japanese Government and NYK of \$66,000. How

does he know that? He is supposed to be testifying from the records. He wasn't there during the conference. He didn't return to the accounting department of NYK until May, 1943, as he testified in interrogatory No. — well, I have lost the spot.

Mr. Glicksberg: Have you finished with your objection?

Mr Saroyan: Not yet, Mr. Glicksberg. Interrogatory No. [89] 16: "I first became acquainted with these records during or about the month of May, 1943 after I had become manager of the General Affairs Department of the Finance Division, Tokyo head office, Nippon Yusen Kaisya."

As a matter of fact, I submit, your Honor, that interrogatory 18, the question and answer, should not be admitted into evidence. It is compound. The record should speak for itself. Based on hearsay testimony. The man didn't participate in any conference and he can't testify to it, and I don't see in the answer itself as to where he got that information. The record should speak for itself.

Mr. Glicksberg: If your Honor please, I take it that Counsel is first attempting to object to the question itself, the form of the interrogatory, and secondly attempting to object to the answer. In so far as the form of the question, unfortunately Counsel has no right to object any more. Your Honor has settled the form of the question at the time the proposed interrogatories, and as such became final under Rule 26-E and Rule 32-C, in so far as the actual form of the question, whether it be compound or complex.

In so far as the answer to the question, it becomes extremely difficult for me to answer Counsel when he attempts to pick out one word or sentence from the answer and attempts to state, "How could this happen, or how could that happen when he wasn't there?" The witness is under oath. The question[90] was asked of the witness. Swears as to whether he has in his record or in his possession certain records. He states he has these records. He is the individual who has possession of these particular records, and therefore would be in—would have control and custody of the records.

He then has the right to be asked the next question, "What do the records show?"

Mind you, if your Honor please, I might go a little further and state that the very records from which he has reached this conclusion will be introduced in this deposition. They follow in the next one or two questions as records of a particular company, NYK, in Tokyo.

Let's find the answer to question eighteen, which question is to say, "Do any of the records of NYK refer to the Muto account, or a particular account?" He says, "Yes, they refer to a particular account, but there is a variance between the accounts." That will clarify itself from the exhibit subsequently introduced. Question asked where he got this information, and he said that came from records which are in his possession. They will speak for themselves. This is purely preliminary to the next two or three questions which introduce the exhibits themselves,

and we submit it is proper, a proper answer to the question.

Mr. Saroyan: May it please the court, in the first two lines the witness testifies: "These figures, as such, do not [91] appear in the records in my possession."

Mr. Glicksberg: Read the next sentence.

Mr. Saroyan: Just a minute, Mr. Glicksberg.

Mr. Glicksberg: "Similar figures are found, namely, \$66,638.25 in the account of Muto, the Consul General of Japan at San Francisco."

Mr. Saroyan: Why don't you let me finish my argument? I don't interrupt you, Mr. Glicksberg. As to the first two sentences, I believe the proper test would be this: If the witness was on the witness stand, would he be permitted to testify to that fact?

Mr. Glicksberg: Definitely.

Mr. Saroyan: He wasn't there: He didn't get there until May, 1943. He doesn't know about the conference. Any conference that he might testify to would be hearsay. He says in the first two lines: "Those figures, as such, do not appear in the records in my possession."

The Court: "However, similar figures, are found, namely—" Giving the figure—"in the account of Muto, the Consul General of Japan at San Francisco."

Mr. Saroyan: "This figure was reached after consultation—" Hearsay.

The Court: Well, I have the assurance he will produce the records.

Mr. Glicksberg. Furthermore, hearsay as against

whom? As against the Empire of Japan? It isn't hearsay, because it is a [92] fact as to the Empire of Japan, who is the alien custodian.

The Court: Are you familiar with those records he has?

Mr. Saroyan: Yes. It is hearsay on top of hearsay. Those are exhibits.

The Court: Very well, I will reserve my ruling on No. 18.

Mr. Glicksberg: (reading) "Interrogatory No. 19: When did such records come into the possession of Nippon Yusen Kaisya, Tokyo Office?

"To the nineteenth interrogatory, he saith: (a) Yes, I do. (b) Yes, they do. (c) The general information pertaining to the background of this account was from the outset in the possession of the Tokyo office——."

Mr. Glicksberg: Your Honor, if you will bear with me, the nineteenth question which I thought had been corrected by stipulation, I would like to read the corrected question, interrogatory No. 19. Interrogatory nineteen, by stipulation which was approved by your Honor, reads as follows:

"(a) Do you have any personal knowledge when such documents or, or records came into the possession of the Nippon Yusen Kaisya, Tokyo office?

Answer: Yes, I do."

The second part of the question: "(b) Please examine documents or records in your possession. Do such documents or records show when they came into the possession of the Nippon Yusen Kaisya,

Tokyo office?" Each one of the answers [93] to (a) and (b) is in the affirmative.

"When did such documents or records come into the possession of Nippon Yusen Kaisya, Tokyo office?" The answer is as follows to nineteen, which reads, "Do you have any personal knowledge when such documents or records came into the possession of Nippon Yusen Kaisya, Tokyo office?" The answer is to that, "Yes, I do."

"(b) Please examine the documents or records in your possession. Do such records or documents show when they came into the possession of Nippon Yusen Kaisya, Tokyo office?" Answer, "Yes, they do."

"(c) When did such documents or records come into the possession of Nippon Yusen Kaisya, Tokyo office? Answer (c) The general information pertaining to the background of this account was from the outset in the possession of the Tokyo office, but the records pertaining precisely to the above-mentioned figure, \$66,638.25, came into the possession of the Nippon Yusen Kaisya during September 1942."

Mr. Saroyan: At this point may we go back to No. 18? Will the record show that I reserved my objection to the form of that question?

The Court: Very well.

Mr. Saroyan: Nineteen as amended we object to.

The Court: I haven't the amendment here.

Mr. Glicksberg: I think it is attached to the interrogatory, [94] if your Honor please.

Mr. Saroyan: This was filed December 21, 1950,

if your Honor please, after being signed by you on that same day.

Your Honor, we object to 19 a, b, c, on the ground no proper foundation laid; this witness, by his own testimony, is not competent to answer the question; by his own testimony he was not at the Tokyo office of NYK until one year after the transaction involved; that the record speaks for itself and that is the best evidence; and the questions don't refer to any specific document.

Further, in the answer the witness says, "The information pertaining to the background of this account was from the outset in the possession of the Tokyo office." Then he contradicts it and says, "records pertaining precisely to the above-mentioned figure, \$66,638.25, came into the possession of the Nippon Yusen Kaisya during September 1942," eleven months after, and we contend that is not admissible under the federal rules of civil procedure 26-D, 28 USCA:

"In any court of the United States and in any court established by act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, or occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the [95] regular course of such business to make such memorandum or record at the time such act, transaction, occurrence, or event or within a reasonable time thereafter."

How could it be argued that one year later the witness testify as to the conference here? Yet they say that is admissible under the exception to the hearsay rule—under the Shopbook Rule. One year later. Possibly they had twenty-five or thirty conferences. Will this court be bound by decisions made in conferences testified by hearsay?

New York Life Insurance Company versus Taylor, 147 Fed. 2d, 297, held:

“Records admissible under established principles of the Shopbook exception to hearsay rule are those which are a product of routine procedure and whose accuracy is substantially guaranteed by the mere fact that the record is an automatic reflection of observations.”

How could it be said there is automatic reflection here when the witness, in the previous question, answering thereto, said conferences were had. “I didn’t have the records in my possession. Conferences were had and as a result of the conferences it was decided NYK had so much money coming”?

Further, 19 (c), we move to strike the answer on the ground that the witness, by his own testimony, could not have had any personal knowledge as to when the records came into the possession of NYK until more than a year after the transaction. He wasn’t [96] there.

If your Honor will look at (b) again, it is merely an opinion and conclusion of the witness. His answer clearly indicates the document doesn’t show where it came into the possession, and when, of NYK. There isn’t a proper foundation laid to the

question (c). The answer, "The general information pertaining to the background of this account —." Background of the account? What does that mean?

Mr. Glicksberg: May I answer?

Mr. Saroyan: "—was from the outset in the possession of the Tokyo office, but the records pertaining precisely to the above-mentioned figure, "\$66,628.25, came into the possession of NYK," one year later.

I submit our objection should be good.

Mr. Glicksberg: Your Honor please, I hope we are not going to be faced with a similar argument on questions which ultimately will have to be argued and go the weight of the subject matter instead of to evidentiary questions.

I assume Counsel is objecting right now to the form of the question. My theory originally is that it cannot be objectionable after it has once been approved by your Honor. But, furthermore, this particular question Counsel propounded himself and we stipulated that that question should be asked in that particular fashion. I would like to have your Honor notice the stipulation. [97]

Mr. Saroyan: That doesn't mean any answer he gives is proper.

Mr. Glicksberg: Will you let me address the Court, please? Therefore, insofar as my questions are good, we need not even reply to that. When we come to the legal effect, when citing cases, again we find ourselves with Counsel citing authorities which have been overruled and supplemented. The Shop-

book Case came into existence long earlier than Rule 43A, June 20, 1946—uniform document rule. As such, any question in the Shopbook Case, which it raises, goes to the weight of the answer, and has no effect and is not before your Honor except going to the weight your Honor wishes to give to such testimony. This witness was asked particular questions by stipulation of Counsel, his own questions: "Do you have any information? Yes, I do."

Mr. Saroyan: Mr. Glicksberg, why not tell the whole story? Why don't say at the time these questions were propounded——

Mr. Glicksberg (interposing): Your Honor please, may I address the court without interruptions?

The Court: I can only hear one of you at a time.

Mr. Saroyan: I am sorry. Are you through, Mr. Glicksberg?

Mr. Glicksberg: No. Shall I ask you to sit, Mr. Saroyan? [98]

The Court: If you don't be careful, gentlemen, I will adjourn so you will cool off.

Mr. Glicksberg: The first question which Mr. Saroyan asked the witness, which we approved by stipulation, modification to your Honor's original—the interrogatories as you approved them, was, "Do you have any personal knowledge when these documents came into your possession?" The witness under oath says, "Yes, I do." Mr. Saroyan said at the present he couldn't have such knowledge because he wasn't there. That is for your Honor to determine. That is an argument to the court to make after the testimony is over.

Next question: "Please examine the documents and records in your possession. Do such documents show when they came into the possession of the Nippon Yusen Kaisya, Tokyo office?" His answer was, "Yes, I do."

The Court: He couldn't have had any knowledge in 1943.

Mr. Glicksberg: No, the question goes——

The Court: That is the objection he is making.

Mr. Glicksberg: No.

Mr. Saroyan: That is the objection I am making. He couldn't have known.

Mr. Glicksberg: There is no such thing like he could not have had—the witness isn't asked whether he had knowledge in 1943. The witness is asked in 1950 whether he knew in 1949. I wish to turn to the record, look at it, the record itself will [99] have a stamp and show to your Honor when it came in, and it will be as testified to.

Mr. Saroyan: The record will speak for itself.

Mr. Glicksberg: It is purely preliminary.

The Court: I am glad you gentlemen get along so well. I think there is a presumption you can. Let him read it, and I won't rule on it until we get a record here.

Mr. Saroyan: One statement I want to make: Counsel doesn't consider the fact that when those questions were asked, how could I know Mr. Hiro-yoshi wasn't in Tokyo on this job until 1943?

The Court: You need not defend yourself at this time. Proceed, gentlemen.

Mr. Saroyan: You are reserving ruling on 18 and 19?

The Court: Yes. You may be sure—don't be uneasy about it. You are not giving up any of your rights at all.

Mr. Saroyan: Thank you.

Mr. Glicksberg: "Interrogatory No. 20: How were such records obtained by Nippon Yusen Kaisya, Tokyo office? "To the twentieth interrogatory, he saith: These records were compiled, as was stated above, by the authority of the foreign office and of the Nippon Yusen Kaisya, after studying telegrams from the Japanese Consul General and communications from the San Francisco office of the company."

Mr. Saroyan: Just a minute. At this time I wish to object [100] to interrogatory No. 20, calling for an opinion and conclusion of the witness; assumes something not in evidence as no records have been identified or admitted in evidence. One thing that disturbs me, the plaintiff comes into this case here trying to show a fraud and conspiracy. My understanding of the law is that he must have clear and concise evidence.

The Court: So I may follow you, there hasn't been a suggestion that I am aware of yet that there is any fraud here.

Mr. Saroyan: His complaints reeks of fraud and conspiracy.

The Court: Read the language.

Mr. Saroyan: All right, your Honor.

Mr. Glicksberg: We don't propose to prove fraud or rely on fraud.

The Court: That is what I want to clear up.

Mr. Saroyan: In answer No. 20, the witness states in his answer records were compiled by the foreign office of the Japanese Government and NYK after studying telegrams from the Japanese Consul General and communications from the San Francisco office of the company. We move to strike the answer, immaterial, calling for a conclusion of the witness, and hearsay testimony.

The Court: Any doubt about it?

Mr. Glicksberg: Yes, your Honor.

The Court: All right, point it out.

Mr. Glicksberg: The way we will connect it up—this is [101] one of the preliminary questions. The records themselves will show the very fact, in substantiation of the answer which this witness gave at the present time, and if we don't connect it up by the exhibits we will submit to your Honor's ruling, of course.

The Court: "After studying telegrams and communications." Are they here?

Mr. Glicksberg: Those records will show a study of the particular records which we are interested in.

The Court: That we are talking about in this interrrogatory?

Mr. Glicksberg: Yes, in this answer. The very exhibits which this gentleman will introduce are in the possession of the NYK.

The Court: I think the better thing to do is to reserve ruling on 20.

Mr. Saroyan: Your Honor, I don't want to take the court's time, but where I got my conspiracy and fraud statement is——

Mr. Glicksberg: I am making a statement to the court. I am relying——

Mr. Saroyan (interposing): The complaint, paragraph 11 and 12, reeks of fraud and conspiracy.

The Court: He answers that by saying he alleged it but doesn't hope to prove it.

Mr. Glicksberg: We are relying on resulting trust.

The Court: Proceed. [102]

Mr. Glicksberg: "Interrogatory No. 21: ——." The amendment, which was won by stipulation. Does your Honor have the new stipulation?

The Court: No, but I will follow it.

Mr. Glicksberg: "Interrogatory No. 21: (a) Do you know if such records were obtained by Nippon Yusen Kaisya, Tokyo office, in the ordinary course of business of said company?"

"To the twenty-first interrogatory, he saith: (a) Yes, I do.

"Interrogatory No. 21b: If your answer to (a) is in the affirmative, were such records obtained by Nippon Yusen Kaisya, Tokyo office, in the ordinary course of business of said company?"

"21b: Yes, they were."

Mr. Saroyan: If your Honor please, we object to interrogatory No. 21 (a) on the ground it is leading and suggestive, assumes something not in evidence. No records have been identified or produced in evidence by the plaintiff, no proper foundation has

been laid, and the witness hasn't been qualified as to time and place of the transaction, and he doesn't have any personal knowledge of the entry of that record. He wasn't in charge of the entries of these records, therefore, isn't competent to answer this question as shown by his own testimony. [103]

The Court: As I have indicated, I will reserve my ruling on 18, 19, 20, and 21, and unless they are connected up I will sustain the objection.

Mr. Gliksberg: If your Honor please, let me answer Counsel for the record.

The Court: Certainly.

Mr. Gliksberg: Counsel has stipulated to this question. The answer the witness gives is just a yes or no answer.

The Court: I have embodied all of those.

Mr. Gliksberg: Counsel was just referring his objection to question No. 21.

The Court: "If your answer to (a) is in the affirmative——."

Mr. Gliksberg: As to whether the witness could or could not testify is a matter for your Honor to determine. It is only an answer he gave to Counsel's question, which was proved by stipulation of the parties. An affirmative yes or no answer.

Mr. Saroyan: How could this man say it was done in the ordinary course of business, your Honor, when he didn't take charge of those records till two years later?

Mr. Gliksberg: You can argue that at the proper time, but you knew the question before you stipulated, and the witness just said yes. How can

you have any objection to a question you make?

Mr. Saroyan: He has already testified he didn't come there until May, 1943. [104]

Mr. Glicksberg: Let's not argue whether or not he is telling the truth. That is for his Honor to determine.

Mr. Saroyan: The objection, if this man were called as a witness——

The Court: But he isn't. We are dealing with this interrogatory. If I limit myself to each individual interrogatory—your position may or may not be correct, I am not prepared to say at this time. But saying, "We shall produce these documents," we will do this orderly. I can't anticipate what may come on here, and for that reason I reserve my ruling and let the record note your objection.

Mr. Saroyan: Will the record note my objection to 21 (b)? I haven't made that yet.

The Court: Very well.

Mr. Saroyan: We object to 21 (b) on the ground the records will speak for themselves as to whether they are records kept in the ordinary course of business, and that the interrogatory calls for an opinion and conclusion of the witness. We contend that this witness was not competent to testify to the matter and he wasn't even present. It assumes something not in evidence, and the records have not been identified properly.

The Court: Let the record so show.

Mr. Glicksberg: "Interrogatory No. 22: ——." This is in the original interrogatories which your Honor approved.

“Did these documents come into your possession as manager [105] and custodian of the records of the General Affairs Department of the Finance Division of Nippon Yusen Kaisya, Tokyo office?

“To the twenty-second interrogatory, he saith: Yes, they did.

Mr. Saroyan: Your Honor please, we object to interrogatory No. 22 and the answer thereto, both, on the same ground, that they assume something not in evidence. There is no reference as to what records he refers to. Mr. Glicksberg went to Tokyo. Why doesn't he show us the record?

Mr. Glicksberg: I will state he was supplied a copy of everyone of those records we will introduce. The alien property custodian was also supplied with copies.

Mr. Saroyan: Mr. Glicksberg, those exhibits you have reference reek with hearsay, just like a novel.

Mr. Glicksberg: But you have them.

Mr. Saroyan: Yes, we have them, but this is the proper time to make my objection.

Mr. Glicksberg: Make the objection, but I don't think——

The Court (interposing): I don't believe either of you are conscious of it, but you are making me very nervous—very nervous. Let's proceed.

Mr. Saroyan: It must be noted that the records did not come into his possession there, whatever records he has reference to, until after conferences were had, and so on, in May, 1943, [106] approximately nineteen, twenty months thereafter.

The Court: Do I understand the written documents are here?

Mr. Glicksberg: Yes, your Honor, definitely. They will be introduced in the next few questions. And Counsel has a copy of them and so does the alien property custodian.

Mr. Lorimier: You mean those exhibits in the back?

Mr. Glicksberg: These very exhibits which were introduced.

Mr. Lorimier: The exhibits that bent here?

Mr. Glicksberg: Copies were taken by Mr. Glicksberg and given by Mr. Glicksberg to the alien property custodian when he came back, and also Mr. Saroyan.

Mr. Saroyan: Yes, Mr. Glicksberg, no question about that; but I think this is the proper time for me to make objection, when you start introducing exhibits, it is all hearsay.

Mr. Glicksberg: Let's not argue. Let's see if we can't irritate his Honor any more than necessary.

Mr. Saroyan: Now, we come to the exhibits.

Mr. Glicksberg: Let's come to the question: "Interrogatory No. 23: If your answers to interrogatories Nos. 18 and 22 are in the affirmative, please refer to such documents; describe and identify each of them, and introduce them in evidence.

"To the twenty-third interrogatory, he saith: "I wish to [107] *the* originals of the following documents and to introduce in evidence a certified photostat (in the case of 'E' below, a certified copy) of each.

“Application for approval to purchase foreign notes, dated October 20, 1941 and addressed to Okinori Kaya, Minister of Finance, together with permit for purchasing of foreign notes (the sum of \$96,100), dated October 20, 1941 (Exhibit ‘A’).”

The Court: Well, we will begin at that point tomorrow. It is a quarter after four now. We will adjourn until ten o’clock tomorrow morning.

Mr. Saroyan: May it please your Honor, will your Honor want us to follow the procedure of having Mr. Glicksberg read each exhibit and then I make objection to the exhibit?

The Court: Well, what do you suggest?

Mr. Saroyan: I think that would be the way.

(Thereupon this cause was adjourned to Wednesday, April 12th, 1951, at the hour of ten o’clock, a.m.) [108-109]

Morning Session, Thursday,
April 12, 1951, at 10 o’clock a.m.

The Clerk: Carr vs. Yokohama Specie, et al, for further trial.

Mr. Glicksberg: Ready.

Mr. Saroyan: Ready.

Mr. Saroyan: Did we get to Interrogatory No. 23? I think we read the question.

The Court: Completed the Interrogatory, didn’t we?

Mr. Saroyan: What?

The Court: I think we had completed it.

Mr. Saroyan: No, got down to 23, that is where the exhibits start.

The Court: That is what I had in mind, Exhibits. Now, I remember distinctly that we had come to the exhibits.

Mr. Glicksberg: 23, if Your Honor please, we were at 23, the answer to Interrogatory 23-A, I repeat the entire answer to the 23rd Interrogatory, the witness sayeth as follows:

“I wish to refer to the originals of the following documents and to introduce in evidence a certified photostat (in the case of ‘E’ below, a certified copy) of each:

A. The first document, ‘Application——’”

Mr. Saroyan: Your Honor please, may I interrupt at this [110] point, before he starts on the exhibits, I wish to move that the answer be stricken on the ground there isn’t proper foundation laid, that the witness is not competent to testify, he is not, hasn’t been properly qualified up to this point in the interrogatories, that is before the exhibits come in.

Mr. de Lorimier: Same objection.

Mr. Glicksberg: I hardly think we need reply, Your Honor please, the various questions propounded to the witness before and his answers certified that he is the head, the manager of the accounting department, he has all these records in his possession, business records, which came in the course of NYK’s business, and as such we are asking him to identify and introduce them as evidence as such custodian, and it is proper because he is in possession of the particular records.

Mr. Saroyan: The authorities point out that——

Mr. Glicksberg: I can read you legions of authorities any man can testify who has actual custody and control of the records in his possession, he can have the Court, bring the records to the Court and have them introduced as records of NYK, Tokyo, their records in the ordinary course of business which came into possession of this man who is the Custodian.

Mr. Saroyan: That is exactly the point we raise, counsel. You have to show these records came into the NYK in the ordinary course of business. Most of them so far were records first brought into the office of NYK, according to the witness, [111] even though he wasn't there, which was in September, 1942, or a period of approximately eleven months thereafter. Anything could happen in a period of eleven months.

Mr. Glicksberg: That is not the law, if Your Honor please.

The Court: Well now, here on the law side, let us try and reason this problem out. Is there any question about them being the books?

Mr. Saroyan: No, I think—you say books?

The Court: Books, what books are there?

Mr. Saroyan: Well, data, documents, records, papers, slips, so on, that this witness has gathered together in the giving of this set of interrogatories, answering the questions. Now, some of the data, books, papers, documents, and so on, didn't come into their possession until a year after the transactions, others just reeking with hearsay, because such conferences were had, cables were discussed. Ac-

cording to the rule those aren't records in the ordinary course of business, as a result of some ministerial act by some routine clerk in the entry of the books of NYK. They have been, in other words, their pieces of papers, documents, letters, as a result of some controversy. Now, that controversy that might have been decided by NYK between the Japanese Government or the Yokohama Bank in Tokyo should not be binding on this Court, the Court should give it no weight at all.

The Court: All this testimony is going in subject to your [112] motion to strike and over your objection. The only way we can get a record that I know of. And if your remarks suggest that counsel here is building up a case by clerks and whatnot, that will be analyzed at the proper time on the record. Do I make myself clear?

Mr. Glicksberg: Certainly.

The Court: All right, proceed.

Mr. Glicksberg: Exhibit A, if Your Honor please, is a Japanese document I would like to introduce formally into the record. Your Honor has the original copy in the deposition, in the interrogatories which reads as follows: The English translation of the instrument in Japanese, which consists of six pages, is as follows:

"To the Minister of Finance, Okinori Kaya.

"Application for the above subject matter is filed as follows:"

Application for approval to purchase foreign exchange notes.

"1. Kind and amount of exchange.

“Telegraphic exchange remittance American money ninety-six thousand, one hundred dollars.

“2. Address of remittee.

“Consul General at Honolulu, twenty-three thousand six hundred dollars.

“Consul General at San Francisco, thirty-nine thousand dollars. [113]

“Consul at Seattle, thirty-two thousand five hundred dollars.

“Consul at Vancouver, one thousand dollars.

“3. Place of payment of exchange.

“Honolulu, San Francisco, Seattle, Vancouver.

“Date payment—Sight payment.

“Address, occupation and name or tradename of drawee.

“Honolulu Branch of Yokohama Specie Bank.

“San Francisco Branch of Yokohama Specie Bank.

“Seattle branch of Yokohama Specie Bank.

“Vancouver-Bank having transactions with the Yokohama Specie Bank (remitted via Seattle branch of Yokohama Specie Bank).

“4. Spot or contract: Spot.

“5. Address, occupation and name or tradename of seller: Tokyo Branch of Yokohama Specie Bank.

“6. Expected time of purchase.

“Within one month after approval.

“7. Purpose of purchase and other reasons necessitating it.

It has been decided lately to send Tatuta Maru, Hikawata Maru and Taiyo Maru of the company to the Pacific Coast of North America as the Govern-

ment [114] requisitioned vessels (Tatuta Maru has already sailed from Yokohama on the 15th instant.) and we wish to send money via the Ministry of Foreign Affairs to the Consul General or the Consul at places involved for the payment of expenses of the three ships at their ports of call in accordance with request of the Ministry of Foreign Affairs.

“8. Other relevant facts.

The details of the necessary sum of the above remittance is as follows:

To Consul General at Honolulu

Tatuta Maru food expenses \$4,000.

Port expenses \$1,966.

Taiyo Maru fuel oil expenses \$6,370.

Water expenses \$209.

Food expenses \$8000.

Ship store expenses \$100.

Lubricating oil expenses \$100.

Port expenses \$2,800.

Total \$23,545.00.

(Amount claimed \$23,600.00).

“To Consul General at San Francisco.

Tatuta Maru

Fuel oil expenses \$19,431.

Water expenses \$180. [115]

Food expenses \$15,000.

Ship store expenses \$2,089.

Lubricating oil expenses \$2,000.

Port expenses \$1,861.

Total \$38,561.

(Amount claimed \$39,000).

“To Consul at Seattle.

Hikawata Maru.

Fuel oil expenses \$14,063.

Water expenses \$20.

Food expenses \$14,000.

Ship store expenses \$1,420.

Lubricating oil expenses \$1,500.

Port expenses \$1,274.

Total \$32,277.

“To Consul at Vancouver.

Hikawata Maru.

Port expenses \$858.

(Amount claimed \$1,000.)

“Total amount claimed \$96,100.”

The signature of this application bears the name Noboru Otani, president, Nippon Yusen Kabushki Kaisha, 20 Marunouchi 2-Chome Kojimachiku, Tokyo, the address.

The Court: How long did you remain in Tokyo?

Mr. Glicksberg: Just about three weeks. [116]

The Court: You have done very well.

Mr. Glicksberg: We also have attached to it a translation of another instrument which is attached to this, which reads as follows:

“Copy 055 15 dated October 20, 1941.

Kura-Tame-So No. 29788.

Permit for purchasing foreign exchange notes.

Sho 16 number 15527.

To Nippon Yusen Kabushki Kaisya.”

This is dated in Japan to NYK. The first evidently, Your Honor, was the application; the second is the permit to Nippon Yusen Kabushki Kaisya.

“Application under separate cover dated October 20, 1941, is hereby approved. (Amount ninety-six thousand, one hundred dollars)

“Okinori Kaya, Minister of Finance.

“Remark: This permit is to be presented at the bank and the endorsement is to be received when purchasing foreign exchange note.”

Below that we have: “Date of transaction or action” a column; we have an amount and we have “the name of the bank engaged in transaction or action”; and we have “remark”. And then we have under the first column, the first line, “October 21, 1941.” The amount, “\$39,000 at 23 7/16” which is the exchange rate. The name of the bank engaged in the transaction, [117] “The Tokyo Branch of Yokohama Specie Bank.” And under the remark column, we have “Sold telegraphic exchange San Francisco.”

We have likewise for the Seattle, Vancouver and Honolulu—I am not going to take the Court’s time to read those. And below that we then have: “Notice: Certification is to be received from the bank engaged in transaction or action.” And then we have: “(Final column is by request of Foreign Affairs Ministry.)”

We have attached to it the Consular certificate which reads as follows:

“Japan, City of Tokyo, American Consular Service.

“I, James V. Martin, Jr., Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, do hereby certify that

this document is a true copy of the original this day exhibited to me, the same having been carefully examined by me and compared with the said original and found to agree therewith word for word and figure for figure.

“In Witness Whereof I have hereunto set my hand and the seal of the American Consular Service at Tokyo, Japan, this 24th day of January A.D. 1951.”

We then have the affidavit of the translator Tetsuo Nukazawa which reads as follows: [118]

“Japan, City of Tokyo, American Consular Service.

“Before me, Glen Bruner, Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, personally appeared Tetsuo Nukazawa, who, being sworn, deposes and says:

“That his name is Tetsuo Nukazawa;

“That he is employed as Consular Clerk to the office of the United States Political Adviser for Japan;

“That he knows well both the English and Japanese language;

“That the attached English-language translations of the attached Japanese-language documents are true and exact translations;

“That this affidavit is made in connection with an action in the United States District Court for the Northern District of California, Southern Division, Civil No. 22509-S; and

“Further affiant sayeth not.”

And then the signature.

Mr. Saroyan: Your Honor wish me to make my objection after each exhibit or shall I reserve the objection until the end?

Mr. Glicksberg: May it be stipulated that the objection goes to everyone? [119]

Mr. Saroyan: They are different objections to each.

Mr. Glicksberg: Any objection you want you can reserve them and put them in after.

The Court: That is agreeable?

Mr. Saroyan: Well, I think that——

The Court: In relation to their admissibility that you do not waive any of the legal rights, you can assert them in making up the record and assign them at that time, your objection to any testimony, if that is agreeable.

Mr. Saroyan: Well, the only thing that comes to my mind is the fact that there will just be repetition and then I will have to call Your Honor's attention at the end to the different pages of the different exhibits and submit they are different objections, the objections aren't all the same.

The Court: Well, if you wish, you may make any objection you wish.

Mr. Saroyan: At this time, Your Honor, I wish to call the Court's attention to the fact that Exhibit A is in two parts. Part 1 is an application undated, no date on this application at all. I don't know whether it is 1939 or 1949.

The Court: Enlighten us in relation to the date on the document.

Mr. Glicksberg: Your Honor please, again we come to the argument on the merits, the witness——

The Court: The document is not dated; if there is any [120] doubt about it determine what the facts may be.

Mr. Glicksberg: The second, the translation, the two documents which are introduced as one, one is an application for a telegraphic transfer. Funds were frozen in Japan as in the United States. The second is the order or is the permit which has been granted. The permit specifically states the “application made under cover dated October 20, 1941 is hereby approved.”

Mr. Saroyan: That is Mr. Glicksberg’s explanation, nothing on these documents here where one document could be tied up with the other, or vice versa.

Mr. Glicksberg: The witness, Your Honor please, —this is a translated application by people who have been sworn, have been certified to by the Consul as to what these two records are, one is an application for a permit, the second is a permit granted by the Government, by the Foreign Ministry. When counsel makes an objection it isn’t a legal objection, the document speaks for itself. About the introducing of the documents we have introduced them. Now, if they don’t tie in, Your Honor will evidently rule for the defendants; if they do tie in, there is no need of our arguing the case and the effect or the authenticity or the value that Your Honor is to give to each one of these particular exhibits. As long as counsel brings up the question, since this is

in Japanese, I have to call Your Honor's attention that from the translation [121] the granting of the permit states the date of the application. I can't read Japanese; I can only take what the Interpreter has given us.

The Court: Have a record on it.

Mr. Saroyan: Well, the only thing I maintain that when a document is submitted or offered in evidence, a foundation should be laid for it.

The Court: No doubt about that, but there is a peculiar situation that exists here; there is no quarrel about that at all.

Mr. Saroyan: Well, I will continue with my remarks. Part 1 is an application undated and from the President of NYK to the Minister of Finance, Japanese Government, for the approval of foreign exchange notes in the total sum of \$96,100, and it covers payment to three places other than San Francisco; and B, I think the second sheet attached to the same exhibit. Part 2 is a permit dated October 20, 1941, authorizing the application. We object to the introduction of these on the grounds that they are not business records, they are not mere routine accounts entered by a clerk in the performance of a ministerial act. The second portion of the document authorizing the application was not even an entry made by NYK, but was a letter from the Japanese Government to NYK; self-serving, from a third person to NYK, nothing to do with the bank, nothing to do with the Consul General, all portions not applicable to [122] the San Francisco office of the Yokohama Specie Bank and irrelevant and im-

material, should be stricken for the purpose of keeping this record clear and brief, what has a telegraphic exchange at Seattle with the Tokyo Branch of the Yokohama Specie Bank or a telegraphic exchange at Vancouver or Honolulu got to do with the issues of this case?

The Court: I think they are remote—you want my present state of mind. He wants a record on it, so if I deny him any legal rights, he can go forward on the record. That is as simple as that to me.

Mr. Glicksberg: Your Honor please, just for the record as long as Your Honor has made a statement that it is remote, I would like to show its connection, direct, just for the record.

The case is proceeding, if Your Honor please, on the basis of a resulting trust. The facts which we have to prove in a resulting trust is the proceeds in this particular account which we are claiming belongs to the creditors of the NYK came from the NYK and that consideration, the additional consideration left in there is what originally came into the account, plus the passengers' fares. Due to that we must have a chain of conditions and a chain of events. Your Honor early in the trial said we would have to connect where the \$39,000 came from—that is the first step, which shows \$39,000 from NYK to the Consul General in Japan. Each step will follow on [123] and it will show that the whole amount in this particular account only came from the proceeds of these particular vessels which were sent here were from the passenger fares. Then under the law we will ask the Court legally to declare a result-

ing trust as against the Alien Property Custodian. That brings up the same question that we have had before, and I do not like to belabor Your Honor with it again, when counsel uses the word "hearsay"—"hearsay" this is an absolute admission by the Empire of Japan, it shows they allowed, they permitted the \$39,000 to come from the NYK to the Consul General solely for the purpose of requisitioning the vessels. You can't talk about hearsay against a defendant who has participated in it and that is the Empire of Japan, which is one of the plaintiffs by intervention through the Alien Property Custodian, standing in his shoes, and the one having a transaction as against the Yokohama Specie Bank, the Yokohama Specie Bank is merely a custodian standing by and watching.

Mr. Saroyan: The Yokohama Specie Bank is no more a custodian and no less than a trustee in bankruptcy of NYK—if Mr. Glicksberg—

Mr. Glicksberg: I don't think we need to go into an argument.

The Court: Trying to give you a record, crystallize the record, give you every opportunity to present any legal points that you have in mind. [124]

Mr. Saroyan: May it please the Court, I don't want to argue the law now like Mr. Glicksberg does, but it is a mystery to me how, by a course of conduct, showing a resulting trust—by a course of conduct you might show fraud or conspiracy, but he says he is not showing fraud or conspiracy. A resulting trust ensues from some contract. I might give to Your Honor \$5,000 so that you may buy a home, but you

take that money and do something else with it, possibly depositing it in the Building & Loan Association. Might be a resulting trust there, but there has been no tying up to this to show a course of conduct with the Vancouver office, the New York office, what has that got to do with the issues of this case?

The Court: I am not prepared to say it has anything to do with the case. I am giving both sides a record so we can make a determination.

Mr. Saroyan: By using sort of a subterfuge. Well, now, referring to these documents as business records the trustee is attempting to prove his case by hearsay evidence to show that. Here is this undated application and on page 2, No. 7, "Purpose of purchase and other reasons necessitating it. It has been decided lately to send Tatuta Maru, Hikawata Maru and Taiyo Maru of the company to the Pacific Coast
* * *"

The Court: He says the date that you suggested is in Japanese. Did I hear that?

Mr. Glicksberg: The date I suggested to Your Honor is [125] set forth in the permit which shows the Government, the Minister of Finance, having stated in the permit granted that the application was delivered to them on the 20th of October, 1941.

The Court: All right.

Mr. Saroyan: The point I am trying to reach the fact that it has been decided it shows it is hearsay. It is not a record of the bank or record of NYK as an ordinary business record in the ordinary course of business.

The Court: Assuming that you are correct, that

is presented to me and if I determine it is hearsay it will be stricken.

Mr. Glicksberg: Exhibit B, which is the answer to the deposition, Exhibit B, question 23, is termed a provisional receipt dated October 21, 1941 for the sum of Y410,026.66, showing a telegraphic transfer of said sum to Honolulu, San Francisco, Seattle and Vancouver by the Tokyo Branch, Yokohama Specie Bank, sealed 'Shibata', and an attached receipt dated October 20, 1941, and signed Tokinosuke Takeuchi, chief accountant to Ministry of Foreign Affairs, showing amount in American money transmitted to Japanese Consul General at San Francisco as \$39,000. (Exhibit B).

I would like to introduce Exhibit B formally and read it into the record.

It consists of two documents, two pages in Japanese which evidently have been translated. One, a temporary receipt [126] reads as follows:

"October 21, 1941, temporary receipt."

And we have the seal, the name of the seal "Ichi-kawa (appears here)".

"Messrs. Foreign Ministry.

"Amount four hundred ten thousand twenty-six yen, sixty-six sen for telegraphic transfer to San Francisco, Seattle, Honolulu, Vancouver.

"Y410,026.66.

"We have duly received the above account.

"Yokohama Specie Bank, Tokyo Branch, seal impression Shibata."

The second page is a receipt dated October 20, 1941, and is captioned "Receipt."

“To Mr. Mitsuzo Matsumoto, Manager of Accounting Department, Nippon Yusen Kabushiki Kaisya.

“Four hundred ten thousand twenty-six yen, sixty-six sen.

“American money undermentioned total ninety-six thousand, one hundred dollars converted into yen at 23 7/16.

“1. Amount transmitted to Honolulu Consul General American money \$23,600.

“Breakdown for payment of expenses for Tatuta Maru \$6,000. [127]

“For payment of expenses for Taiyo Maru \$17,600.

“2. Amount transmitted to San Francisco Consul General American money \$39,000.

“For payment of expenses for Tatuta Maru \$39,000.

“3. Amount transmitted to Seattle Consul American money \$32,500.

“For payment for expenses for Hikawata Maru \$32,500.

“4. Amount transmitted to Vancouver Consul American money \$1000.

“For payment of expenses for Hikawata Maru \$1,000.

“Total American money \$96,100.

“Received the amount above in yen by Bank of Japan check.”

The seal is: “Tokinosuke Takeuchi, chief accountant of Foreign Ministry.”

We then have the affidavit of James V. Martin,

which is a similar affidavit as we have read into the record, which we will ask Your Honor's indulgence——

Mr. Saroyan: Didn't I stipulate to those affidavits so you won't take the Court's time? Those affidavits are just routine.

Mr. Glicksberg: I am having them in the record, maybe stipulated in the record so that we don't have to read them in the record. [128]

Mr. Saroyan: Your Honor, on B Your Honor will note that Exhibit B is in two parts. The first page being a temporary so-called temporary receipt issued by the Yokohama Specie Bank, Tokyo office, to the Japanese Foreign Ministry acknowledging receipt of Y410,000. The Court will note that the receipt is of the Yokohama Bank in Tokyo and it doesn't in any way revert to having received money from NYK. It was issued to the Foreign Ministry acknowledging money from the Japanese Government to the Yokohama Bank in Tokyo. We have no objection to that receipt going into evidence.

Now, as to the second portion of the Exhibit B, it is entitled receipt, dated October 20, 1941, is from the Japanese Foreign Ministry to NYK for the sum of Y410,000. It is to be noted that this receipt states at the bottom: "Received the amount above in yen by Bank of Japan check."

The receipt merely states they are amounts of money and made to the various offices of the Consul General. This receipt, although addressed to NYK, states that the receipt of money is in yen by Bank of Japan check, and I think coupled with the other

portion of the exhibit shows the Yokohama Specie Bank in Tokyo acknowledged receipt of this money from the Japanese Government.

Now, the second portion we object to the introduction of Exhibit B in evidence on the grounds they weren't business records kept in the ordinary course of business, weren't just [129] routine entries made by a clerk in the performance of a ministerial act, were not even entries made by NYK, but they were entries made by third parties, to wit, the Yokohama Specie Bank, Tokyo office. And they were sent to the Foreign Ministry of Japan and it isn't an NYK record. How could this gentleman, whose testimony Mr. Glicksberg has taken, testify to this?

Mr. Glicksberg: You make your objection, don't argue.

The Court: I may indicate to you now, gentlemen, don't mislead ourselves, unless the second document is connected up as a legal proposition, it will be stricken.

Mr. Glicksberg: No question about that.

The Court: Let me assure you no one is disappointed here. I may fall into error, but everyone has a record and they will have their day in Court.

Mr. Saroyan: I am convinced of that, Your Honor.

The Court: All right, now let us proceed.

Mr. Glicksberg: Exhibit No. C from the answer of Mr. Hiroyoshi, the witness, is a debit note dated October 20, 1941, issued by Chief of Finance Division, Nippon Yusen Kaisya, to President, Nippon

Yusen Kaisya, in the sum of Y410,026.22. (\$96,100) (Exhibit C).

The document itself is just one page and we would like to read the translation into the record. It is captioned, "Certificate of Payment, dated October 20, 1941.

"To: Director. [130]

"Certificate of payment.

"Outstanding account.

"Seal of Accounts Department Chief Seal of Accountant Chief.

"Sum of: Y410,026.66 only.

"Proviso: The amount of remittance in American currency is as follows:

Honululu (for Tatuta Maru) \$6,000.

Honululu (for Taiyo Maru) \$17,600.

Total \$23,600.

San Francisco (for Tatuta Maru) \$39,000.

Seattle (for Hikawata Maru) \$32,500.

Vancouver (for Hikawata Maru) \$1,000.

Sum Total U. S. \$96,100. (Exchange at 23 7/16 Y410,026.66.

"I do hereby certify the above.

"Mitsuzo Matsumoto (seal) Accountant's Section Chief."

Mr. Saroyan: Your Honor please, Exhibit C, a certificate of payment, is addressed merely to Director. It is objectionable on the ground there is no reference in this document either to NYK or to the Yokohama Specie Bank, Tokyo, or to the Japanese Government especially, no reference, no way of tying it in. It does not indicate what the director was

or from what accountants' office, or from what office to what office it went to. [131] It doesn't disclose payment to the Japanese Government for transmission to the Consul General account. It does not appear to be of any value in this case here for the plaintiff or the defendant. Object on the grounds it is not a business entry, self-serving, irrelevant to the issues of this case.

Mr. Glicksberg: Exhibit D. The witness testifies and introduces D, Your Honor please, is a letter from the Director of the Political Affairs Bureau, the Ministry of Foreign Affairs, Imperial Japanese Government to the President of NYK, dated November 26th, 1943, showing disposition of funds expended in connection with repatriated Japanese Nationals.

Exhibit D, like to read for the record this Exhibit D, a transaction. On top of it—it consists of a document of thirteen pages in Japanese.

“From: Director of the Political Affairs Bureau, the Ministry of Foreign Affairs. Dated November 26, 1943.

“To: President of the Nippon Yusen Kabushiki Kaisya.

“Re: Disposition of funds relative to repatriation vessels for Japanese Nationals.

“In regard to the above subject matter which you have written to us per your letter KA-EN-GAI No. 43, dated August 10, of the funds relative to special assigned vessels for North America and Canada, we hereby, reply as follows and as to the funds rela-

tive [132] to 'Asama Maru' and 'Hie Maru', some reply will be made later.

1. Of the funds in question, those that are frozen at the various places involved are to be returned after the end of war by some method such as transferring the account from the special account of the Ministry of Foreign Affairs offices abroad to the account of your branch offices in various places involved.

2. Of the funds in question, those that have been appropriated by Governmental offices abroad to defray various expenses of such offices are to be returned to your company in Japanese money.

In such cases, the exchange rate will be that agreed among Japanese banks for A.S.T.T. selling rate as of December 12, 1941. The same is to be applicable to such funds which will be transferred to Japanese Imperial Government fund and used hereafter.

3. In regard to the balance of the funds in question at various places, the confirmation is hereby made that the amount mentioned on the detailed statement attached to your letter Ka-En-Gai No. 117, dated November 4, last year, have been revised as follows as a result of study made in presence of employee of your company in charge and official of our Ministry in [133] charge. (Refer to the attached document: Settlement account of expenses of special assigned vessels for North America; and your letter Kei-Ko No. 106 dated September 23, last year.)

“a.” —

The Court: Last year, what does that mean?

Mr. Glicksberg: Last year, and this refers to '43, so it would be 1942. I am reading the letter, Your Honor.

The Court: All right.

Mr. Glicksberg: "a. That of 1st assigned vessels San Francisco (Tatuta Maru) \$66,638.25.

Seattle (Hikawata Maru) \$29,646.06.

Honolulu (Taiyo Maru) \$26,908.38 (includes Tatuta Maru).

Sub-total: \$123,192.69.

"b. That of 2nd assigned vessel

San Francisco (Tatuta Maru) \$26,000."

I might here state, if Your Honor please,—I am not reading, not concerned with the Tatuta Maru's second voyage, because it never reached the United States, supposed to arrive here December 5, didn't come here because war was imminent, went to Honolulu and was turned back. That is not a part of the testimony.

Mr. Saroyan: You're making a statement that you are not interested in the Tatuta Maru's second voyage; why are you [134] interested in all these other voyages to Vancouver and the sales made?

Mr. Glicksberg: I am not in this trial, I am not interested—

Mr. Saroyan: You read everything in the record.

Mr. Glicksberg: I am reading the whole record; I can't divest part of it. Incidentally, the correspondence between the Empire of Japan and NYK, Tokyo, includes all these references.

“c. That appropriated as expenses of Governmental offices in various places involved.

Vancouver (Hikawata Maru) Canadian money \$7,218.90. American money \$1,000.00 (In Canadian currency \$1,100.00). Settlement account of expenses of special assigned vessels for North America.”

The Court: Wouldn't you get the same results by giving a total of those totals?

Mr. Glicksberg: No, I am just reading the exhibit for the record.

The Court: Being offered in evidence?

Mr. Glicksberg: Yes. As we are reading Your Honor will become familiar.

The Court: I have in mind the detail——

Mr. Glicksberg: No, I don't care about that, but the facts [135] of the arrangement between the Empire of Japan and NYK is to the plaintiff controlling as against the Alien Property Custodian.

“1. That of 1st assigned vessels.

“In regard to the contents of income and expenditures (including disposition of passage money income) of expenses of assigned vessels in question at respective ports of call, the status of settlement of account were from time to time telegraphed by the Japanese Consuls or NYK branch offices at respective ports of call to the Ministry or NYK head office respectively. However, War of Greater Far Asia was commenced either prior to the complete settlement or after posting of the detailed report of such account. Furthermore due to the fact that carriage of all papers related to this matter was prohibited in recent exchange of the United States and Japa-

nese diplomats, great difficulties were encountered. However, at the Ministry, in the presence of officials of the Consulates involved, members of NYK branch officers and employees of NYK head office in charge of the matter, based on telegrams of that time and slips of paper which members of the Consulates managed to bring back a careful study was made and as a result we have been able to prepare the following detailed lists which have been recognized as authentic [136] contents of the various settlement made in connection with the matter at respective ports of call.

“(1) San Francisco (Tatuta Maru).

“a. Balance: \$66,638.25.

“The above is the estimated balance of telegraphic report dispatched by General Consul Muto in San Francisco on November 14 and received on the 15th. Since then in expenditures, as there were some changes in estimated expenditure of that time, actually there is change in the balance (the receipt of the deposit in Y.S.B. in San Francisco-Special Consular Account; details of incomes and expenditures account and/or any other evidentiary documents are not in evidence.)

“b. Although the balance calculated by the NYK (according to telegram dispatched by S.F. Branch of head office) is \$66,750 and it differs somewhat with the Consulates' estimate balance (in regard to the passage money income, there is also some discrepancy between the reports of the Consulate and NYK branch office) at the occasion of study made in presence of NYK head office in charge and officials

at San Francisco Consulate of September 18, the understanding was reached whereby the balance indicated in telegram from Consulate was accepted.

“c. The balances of the account according to [137] Consul-General’s report and NYK San Francisco branch offices report are as follows:

(a) Consul General’s telegram (received November 15)”

Then we have a list, Your Honor; perhaps we do not need to read it but may be considered as in evidence, the account figures showing a balance of \$66,000.

We then have likewise settlement of the Seattle and the Honolulu which perhaps I should like to have the Court consider as part of the exhibit in evidence, although not pertinent to this particular case, and I shall refrain from reading that particular portion. Goes on to the general accounting which we can dispense with and consider as part of the exhibit as having been read in evidence.

Mr. Saroyan: Your Honor please, the Exhibit B—Your Honor must note that this exhibit is dated November 26, 1943, two years after the alleged transactions took place. And it violates violently the rule laid down in *Moran vs. Pittsburgh Steel*, I call Your Honor’s attention to 86 Fed. 2(d), and it is from the Foreign Office of the Japanese Government to the president of NYK, and this document attempts to set forth the disposition of funds allegedly supplied by NYK for transmission to the Consular accounts. And it is an attempt of settlement of accounts between the Government and NYK.

There is a settlement of those accounts. It is our contention it is a debtor-creditor [138] relation between NYK in Tokyo and the Japanese Government and has nothing to do with the issues of this case.

This document in my opinion is hearsay of the worst kind, not an entry of the records of NYK, concerning a transaction that was made more than two years after the transaction involved herein and it is not a business entry of NYK, but merely a letter from the Japanese Government to NYK received two years later in response to an inquiry made by NYK to the Japanese Government; self serving. Under any theory it shouldn't be admissible as routine business records and they weren't records that were formulated in the ordinary course of business.

The Court: That seems unanswerable; his legal position seems unanswerable.

Mr. Glicksberg: Not unanswerable. It is entirely false. The position we have taken here, as I said before, Mr. Saroyan keeps talking about hearsay. Insofar as the Yokohama Specie Bank we are presenting them as against an accounting between the Empire of Japan and NYK; insofar as these two individuals who claimed to be the recipient entitled to this one fund which the Yokohama Specie Bank says it has, it is not only an admission against interest, but it is an accounting between the defendants, the defendant Alien Property Custodian and the NYK in Tokyo, and admissions not only against interest, but actually statements in there that the funds belong to the NYK and will be paid to them.

So when we talk about hearsay, counsel talking about the Yokohama Specie Bank upon which ground, if we were attacking the Yokohama Specie Bank, merely as a stakeholder it would be hearsay, but our evidence is going in as between the only two people who claim they are entitled to this fund, the Empire of Japan, because the Alien Property Custodian stands in its shoes, and the creditors of the NYK.

So when we talk about hearsay, when we have an arrangement made, a settlement made between the Minister of Affairs, Finance Division, the Government itself, and the officials of the NYK, it could be hearsay against the Yokohama Specie Bank, but it definitely is a settlement between the defendant, the Alien Property Custodian and the NYK.

I would like to read the next exhibit.

The Court: I want you to get a record.

Mr. Glicksberg: All right.

Mr. Saroyan: Your Honor please, a settlement made two years later, I don't care, a Japanese, an Oriental transaction was involved after two years had elapsed, presenting papers as of November, 1943. Mr. Glicksberg seems to have an idea in this case that by using a deposition or written interrogatories there is some magic involved, that you could get into evidence everything under the sun. The only testimony if this witness is on this witness stand—how could he ever testify to these things or offer these things in evidence? He had no knowledge of them. [140]

Mr. Glicksberg: Shall I answer?

Mr. Saroyan: How can they be considered as business records?

The Court: Don't interfere with counsel, please.

Mr. Glicksberg: I am sorry, I beg your pardon.

Mr. Saroyan: How can they be considered as business records of the bank in the ordinary course of affairs, a settlement two years later?

Mr. Glicksberg: My only reply is going to be very, very short, is that Mr. Hiroyoshi is not testifying to the contents of these documents. He has brought forth the documents as being in his custody, he has produced them. The documents speak for themselves.

The Court: I fully appreciate your struggle. Proceed.

Mr. Glicksberg: Exhibit E, which the witness has introduced, he captions: "Certified copy of compilation entitled 'Details of Special Assignment of Vessels to America', dated December, 1942, and compiled by Section 7, Political Affairs Bureau, Ministry of Foreign Affairs, Imperial Japanese Government (Exhibit 'E')."

Mr. Saroyan: Going to read all this, Mr. Glicksberg?

The Court: We will take a recess, and so both sides may have a record, we may be able to eliminate a lot of this detail we are going into.

(Short recess.) [141]

Mr. Glicksberg: Exhibit E, if Your Honor please, consists of a confidential report of the Bureau of Political Affairs, Ministry of Foreign Af-

fairs of the Japanese Government dated December, 1942, pertaining to the details of special assignment of vessels to America. It consists of a Japanese document approximately 50-55 pages and has to do with vessels, has to do with the decisions of the Cabinet why the requisitioned vessels had been sent, why the vessels had to be requisitioned, because of the negotiations between the various state departments, and so forth.

I would like the whole exhibit introduced in evidence and considered as part of the records. I would like to read certain parts of the exhibit for the purpose of saving time which will have to do with the intent of the parties—by the parties I mean the Alien Property Custodian, the Empire of Japan and the NYK, and the portions pertaining to the settlement of the accounts.

First is: "Decisions reached by Cabinet for special assignment of vessels to America."

Goes as follows:

"As a result of the application of the Monetary Freezing Act to Japan by America in July of last year, the Trade and Maritime communication between Japan and America ceased. The actual situation was that in spite of Ambassador Nomura's negotiation with America to overcome this condition, there were little hopes of settlement [142] unless an over-all understanding was reached between Japan and America. Members of Japanese banks and firms and nationals in general in America who were obliged to evacuate as a result of the application of the Monetary Freezing Act and waiting for

vessels at ports on the West Coast of America reached approximately 2,000 persons, and on the other hand, those desirous of evacuating Japan for America (Americans, Niseis, and those re-entering America) numbered more than 1,000 persons. In view of the situation, if time were left to idle away, there were fears that it would bring unrest among those standing by for sailings and result in bad effects upon those Japanese nationals who are to remain in America. In consideration of this, and for the purpose of taking care of these evacuees staying in Japan and America at the minimum degree and at the same time transporting the mail matters clogged in Japan and America, the Cabinet made the following decision on September 29 of last year for the execution of the assignment of vessels for this purpose with the understanding that the actual loss incurring from the operation would be compensated by the Government.

“Decision of the Cabinet (September 30, 1941)

“Matters pertaining to the special assignment of vessels to America. [143]

“1. Aims:

“Because two months have lapsed since the break of trade and maritime communication between Japan and America, which resulted from the freezing of Japanese funds by America, negotiations are being made with the Department of State through Ambassador Nomura to overcome the situation, but the present circumstances show that there is little hope of the negotiations being successful unless an

over-all understanding is reached between Japan and America.

“Those connected with Japanese banks and firms and other nationals in general in America who were obliged to evacuate as the result of the freezing of funds and are already waiting for vessels at ports on the Western Coast of America are numerous (about 2,000 applicants for passage) and those desiring to return to America from Japan (Neises and those re-entering America) are also numerous (about 1,000 persons). If time were allowed to pass by under this situation, it could not be guaranteed that it would not cause unrest among these evacuees and not have bad effects eventually upon the nationals who are to remain in America. The situation is such that the evacuation of a minimum degree of the aforementioned personnel under the special circumstances cannot be helped. [144]

“Therefore, with the object of taking care of those waiting for embarkation in this country and America, special assignment of vessels are to be made to the West Coast of America by the following plan of execution.

“2. Plan of execution.

“A. Special assignment of Nippon Yusen’s *Ta-tuta Maru* to Seattle, San Francisco, Los Angeles from Yokohama via Honolulu shall be made regardless of the existence of cargo. It shall be sailed from Yokohama by October 10 as soon as an understanding is reached with the American Government.

“B. The number of voyages for the present shall be three, and the power shall be granted to each of

the Consulates concerned to select the passengers so that the waiting evacuees will be generally taken care of by the above.

“However, from the points of view of taking care of the nationals to remain and adjustment of Japan-America relations, the number of the above voyages shall not be made public and steps shall be taken as far as possible at home and abroad to give an outward appearance as if the regular services were commenced.

“C. Inasmuch as it is expected that passengers will be booked to capacity, practically no loss is expected in spite of no cargo bookings. In case a [145] loss should occur, the Government shall examine the actual operating expenses and compensate the actual loss.

“D. Should America ask for approval of a special call of American vessels at ports in Japan for the transportation of Americans in Japan desirous of returning to America as a bargaining point of approving this special assignment of vessel, it shall be approved, subject to designation of ports of call.

“2. Japan-America negotiations concerning assignment of vessels.

“A. Japan-America negotiations leading to materialization of assignment of vessels. (Operation of Imperial Government requisitioned vessels).

“For the purpose of this assignment of vessels, it was necessary that large-sized passenger vessels of Nippon Yusen or Osaka Shosen be used, but inasmuch as they were being used by consignees in America for the non-fulfillment of transportation

contract of cargoes which had been shipped back when both companies suspended the operation of their American services as a result of the application of the Monetary Freezing Act to Japan by America, there were fears that, should vessels of both companies enter American ports, they would be seized immediately as securities [146] of the above-mentioned suits; so Ambassador Nomura was ordered to make negotiations with the American Government to get an understanding from the American side for the prevention of the occurrence of the above-mentioned difficulty so far as it concerns this assignment of vessels. However, the American administrative authorities concluded that they could not agree to an understanding that the vessels would not be seized because it belonged to the judicial field. Though there were difficulties of an agreement being reached in the Japan-America negotiations,"—Perhaps I am going too fast.

The Court: Identify the record so he will have a lead.

Mr. Glicksberg: Yes, it is——

The Court: And the portion——

Mr. Glicksberg: Yes.

The Court: —that you are reading.

Mr. Glicksberg: (Continuing): "we were confronted with an emergency of the materialization of the assignment and in consideration, too, of the recommendation of the Embassy involved, it was decided to assign, as the first vessel, Nippon Yusen's Tatuta Maru to Honolulu and San Francisco as an Imperial Government requisitioned vessel.

In case there were no chances of an early establishment of the [147] above-mentioned claims, a second vessel (Nippon Yusen's Hikawata Maru, at first scheduled for assignment to Los Angeles and later changed to Seattle and Vancouver) and a third vessel (at first Osaka Shosen's Buenos Aires Maru and later changed to Nippon Yusen's Taiyo Maru for Honolulu) would be assigned as Government requisitioned vessels. With this plan in mind, Ambassador Nomura was instructed to negotiate with the American Government for a guarantee of non-seizure of these three vessels and of supply of fuel-oil. The American Government made the following reply by an old statement on October 18 to the effect that in case a formal statement was made to the American Government that the afore-mentioned three vessels were requisitioned ships of the Imperial Government, it would be ready to call the attention of the judicial authorities with an object of removing difficulties that may arise by the filing of suits by civilians in America against the afore-mentioned vessels and would supply the vessels with ample fuel-oil, food, etc.

“Oral statement of the American Government regarding the special assignment of vessels to America.”

The Court: Page what?

Mr. Glicksberg: Page 3; reading from page 3.

“(This statement which was translated into Japanese [148] is re-translated into English.)

“The following oral statement as of October 8 is

made in reply to the oral statement submitted on October 7 by a Japanese embassy member to the Department of State concerning the commission of three requisitioned vessels of the Japanese Government to the United States. The Government of the United States has no objection to the schedule of the three Japanese vessels based upon the itinerary as submitted by the Japanese Embassy.

“However, as for the wishes of the Japanese Government that this Government guarantee the non-seizure of the vessels concerned by reasons of shipment claims, etc., the United States Government has no judicial authority to prohibit the exercise of legal rights of individuals in America having claims against Japanese shipping concerns to file suits to obstruct the activities of these vessels.

“However, in case the Japanese Government informs this Government by formal statement that the three vessels concerned are requisitioned vessels of the said Government, this Government is ready to call the attention of the judicial authorities concerned with reference to the statement of the Japanese Embassy to this department, certifying the requisition of the said vessels, with the object of removing difficulties that [149] may arise by suits against these vessels if suits are filed against the above vessels by civilians.

“It is desired that copies of requisition papers be attached to this type of request from the Japanese Embassy and that mention be made that they are under Government mission. These vessels shall be

able to take ample fuel, water and food necessary to return to a Japanese port.

“Needless to say, the trade between the United States and Japan is subject to the freezing regulations, and this Government understands that the dispatch of the three Japanese vessels to the United States referred to in the Japanese Embassy’s request under date of October 7 has no connection with the question of cargoes.

“As for the wishes of the Japanese Government that it not be made public that the three Japanese vessels involved are Japanese Government requisitioned ships, this Government believes that in order to check the dangers of suits that may be filed, it is necessary and appropriate that it should be made clear at least in the United States from the outset that the vessels are Japanese Government requisitioned vessels. In case a request is made to inform the Court to the effect that the vessels are requisitioned, this Government shall be obliged to make it public. [150]

“Therefore, this Government deems it to be proper to make the matter public by adequate means from the outset.

“The information of the Japanese Embassy to the effect that conveniences of passage by the vessels involved would be offered as per schedule to Americans desirous of returning to the United States from Japan is acknowledged. Therefore, in accordance with the above, the Department of State will instruct the American Embassy in Tokyo to

submit a list of Americans desirous of taking passage.”

Then we go on.

“Therefore, in order to put this matter into execution quickly upon reaching an agreement in accordance with the American reply, it was decided to commission the three Nippon Yusen Kaisya vessels, Tatuta Maru, Hikawata Maru and Taiyo Maru, for the operation by taking the formality of requisitioning the respective vessels by the Imperial Government. Requisition papers (see note.) for the above three vessels were dispatched by the Nippon Yusen Kaisya. It was made clear that the above three vessels were under requisition of the Imperial Government. At the same time, the under-mentioned officials from the Ministry of Foreign Affairs and communications boarded [151] the vessels in the capacities of document carriers and supervisors for controlling matters concerning the embarkation of those waiting in America for sailings and for liaison matters with American and Japanese officials and Yusen representatives at ports of call. Officers of the vessels received appointments to the personnel (non-official staff) of the Ministry of Communications and engaged in the operation of the vessels.

“In accordance with the afore-mentioned request of America, copies of the requisition papers were delivered to the American Embassy in Tokyo on October 14 together with copies of the schedule, embarkation orders to supervisors, writ of appointment of officers of vessels to the non-official staff of the Ministry of Communications and, at the same

time, the circumstances of dispatch of the requisitioned vessels were telegraphed to Ambassador Nomura in America, and delivered to the American Department of States."

We then have a "requisition order on page 5 to the NYK dated October 14 from the Ministry of Communications. It reads as follows:

"To the Nippon Yusen Kaisha.

"The Imperial Japanese Government hereby requisitions the M. S. Tatuta Maru of the Nippon Yusen [152] Kaisha with the view of transporting passengers and mails between Japan and United States.

"The Imperial Government is to operate the said ship from Yokohama to San Francisco via Honolulu on the outbound voyage and from San Francisco to Yokohama on the return voyage, in accordance with the schedule appended to this order.

"Let it be noted that the Nippon Yusen Kaisha shall, on behalf of the Imperial Japanese Government, conduct those business matters which may arise in regard to the aforementioned voyage, under the direction of a supervisor who is to embark the Tatuta Maru by order of the Government and in conformity with the following stipulations:"

One has to do with the change in schedule. Two has to do with the embarkation of passengers. Three, no ordinary cargo should be carried, and, four, "The Nippon Yusen Kaisha shall submit to the Minister for communications a detailed statement of income and expenditure at the end of the voyage."

Signed by S. Yozo Murata, his Imperial Majesty's Minister for Communications.

We then have on page 6 an action which pertains to the Japanese-American negotiations concerning the disposal of expenses incurred from the assignment of vessels, negotiations for releasing [153] funds frozen in America for payment of bunker charges.

“In the American ‘oral statement’ regarding the assignment of vessels involved, statement is made to the effect that bunkering (fuel, water, food, etc.) of the vessels would be approved, and we repeatedly negotiated with the American Department of State through the Ambassador in America for the release of part of our funds frozen at the Yokohama Specie Bank for the payment of the bunker charges involved. Inasmuch as America did not give approval to this, we deemed it appropriate to transmit from Japan a part of the necessary funds to the Consulates in Honolulu, San Francisco and Seattle where special accounts would be set up. The above transmission and revenue from passage fares would be placed in the accounts, and from which port charges, expenses for fuel, food, etc. will be paid. With this plan, Ambassador Nomura negotiated with the American Department of State and received the agreement of the Treasury Department. Thereupon the head office of Nippon Yusen was called upon to calculate the amount of necessary funds. The said amount was to be transmitted by telegraph from the Ministry via the Yokohama Specie Bank directly to the Consulates at the ports

of call as mentioned below. (As the above expenses were to be borne by [154] Nippon Yusen, at first it was expected to have Nippon Yusen handle the telegraphic transfer for the Imperial Government, but from the fact that the assigned vessels were under the requisition of the Government, the remittances were made by the Imperial Government from the point of view of formality rather than to put Nippon Yusen in the limelight out of consideration of the American judicial authorities and because of the American opposition.) Details of the payments of the above bunker charges were telegraphed to these Consulates, which were instructed to file applications of approval."

There are some figures here which I will skip. However, to San Francisco for Tatuta Maru, \$39,000.

"Negotiations for release from freezing of passage revenues."

Page 7 may be of interest.

"Orders were sent to Ambassador Nomura to make negotiations with the American Department of State for our desire to receive special consideration for the exemption of the application of the Freezing Act upon the passage revenues by giving as one of the reasons that the vessels to be assigned are Government requisitioned. However, the Embassy reported us its opinion to the effect that there was little hope in the negotiation for the release when an approval had not [155] yet been given even for the official money of the Embassy and that in view of the past attitude of America, there was

fear that it might become an obstacle to the ships' sailings if the passage revenues were kept in cash by the Consulates. It pointed out that there was no alternative but to receive the passage fare in cash or check, if not pre-payable in Japan, and deposit the same in the special Consular accounts and, later, appropriate it to the official Consular expenses on basis of the agreement between the Governments of Japan and America for the special mutual disposition of Governmental office expenses and living expenses of members thereof. Therefore, Ambassador Nomura was informed to the effect that is a general release of the passage revenues from the Freezing Act was unobtainable, there being deposited in the special accounts as reported by the Ambassador would be considered unavoidable, but was instructed to negotiate, even under such a case, for an understanding for the release of the passage revenues from freezing for payment of spot expenses exceeding the remittances, for the final agreement that the balance of the passage revenues after deducting the above would be appropriated as a remittance from Japan in case the aforementioned Japan-America agreement is reached, and for the understanding [156] that the above passage revenues would be disposed of as special Consular accounts. To this, America would not agree to the exemption of the application of the Freezing Act to the passage revenues paid in America but approved the transfer of the above to the Consular accounts and the defrayment of part of the expenses of the assignment of vessels from the accounts. As for the release of

the balance for official payments when an agreement is established between Japan and America, a reply was received to the effect that there was no objection in principle and that a report be submitted as soon as the amount is known.”

This is evidently an affirmation of the assistant Secretary Acheson to Councillor Iguchi of the Ministry.

I want to read paragraph 9—page 9, a portion of four in the caption: “Handling of business at port of call.”

The Court: What page?

Mr. Glicksberg: Page 9, article 4, handling of business at port of call.

“Inasmuch as the formality of requisitioning the vessels involved was taken by the Imperial Government at the understanding of the American Government as already mentioned because of the fears of suits being filed for the claims of Americans against the Nippon Yusen Kaisha, outwardly the Consulates at the port [157] of call were to take charge of all business in the name of the Imperial Government, but in actuality, Letters of Attorney to handle the business were issued by the Consulates to the Yusen branch managers at the ports of call, who took over the business at the supervision of the Consuls concerned.

“Expenses relevant to the vessel involved and passage revenues at the ports of call shall be defrayed from or deposited in the special accounts in the name of the Consuls, especially set up at the Consulates of the ports of call as the result of the

aforementioned Japan-America and Japan-Canada negotiations. Outwardly, the Consuls were to handle the accounts because of the fact that the vessels were requisitioned by the Government, but inasmuch as all expenses coming from the assignment of vessels involved were borne by Nippon Yusen and the payments of the expenses were to be handled by Nippon Yusen, the managers of Nippon Yusen branch offices handled the receipts and disbursements at the supervision of the Japanese Consuls."

On page 15 we have a caption, a portion of this letter which is No. 7, which is termed: "Settlement of accounts of assigned vessels," which reads as follows:

"As the the contents of the income and expenditure [158] (including disposition of passage money) of the assigned vessels at various ports of call, they were from time to time reported to the Ministry by the Japanese Consuls and to the Nippon Yusen head office by the Nippon Yusen branch offices of the respective ports of call by telegram. However, before the accounts were settled or while the detailed reports were being forwarded to Japan the greater East Asia War Broke Out. In addition, when the exchange of Japanese and American diplomats, were made, the carriage of any document related to this matter was prohibited and because of that great difficulty was encountered. Nevertheless, at the Ministry in the presence of the members of the Consulates involved, staff of Nippon Yusen branch offices and Nippon Yusen head office personnel in charge of the matter, based on evidential

scraps of paper brought back with difficulty by the Consular members and telegrams of that time the matter was given much study. As a result we have been able to arrive at the following detailed lists which we believe to be accurate account of contents of settlement at various ports of call.

“Furthermore, as to the balance of the passage money at various North American ports of call, negotiation was under way to have them released from the [159] application of the Monetary Freezing Act in order to use them to defray expenses of offices of the Ministry there. Although the United States Government had an inclination to accept our proposal, before detailed arrangements were made, it became impossible, due to the commencement of the Greater East Asia War.”

And we have San Francisco, the entire balance which was read in one of the exhibits before, of \$66,638.25, and they have the balances of the various other vessels. The other portion has to do with the second assignment of vessels which was completed in December, with which we are not concerned at the present time.

Mr. Saroyan: Finished with that exhibit?

Mrs. Glicksberg: I thought you made your objection before it went in?

The Court: Let him make his objection for the record.

Mr. Saroyan: Your Honor please, Exhibit E, in our opinion, is heresay of the worst order. It is a Government compilation prepared, or at least dated approximately twelve or thirteen months after the

so-called—fourteen months after the so-called transaction took place. It was compiled by the Bureau of Political Affairs, Minister of Foreign Affairs, Imperial Japanese Government, and it, the exhibit, sets forth communications between the American State Department and the Japanese Government Cabinet regarding the plan to send the ships to [160] America, and we object to the introduction of this document. It violates the rule in *Moran vs. Pittsburgh*; it is hearsay, self-serving, it is not an entry made at or near the time of the transaction, in fact, it is not a business entry at all, a letter, a letter from a third party, the Japanese Government after approximately a year of research and relates the extraneous material regarding Canadian Consul, other Consuls, have no relation, completely foreign to the issues of this case; it is not a part of the NYK record, it is a letter written by a third party and it just reeks with hearsay because it comes from the political ministry. The Japanese Government is not a party to this action, and as Your Honor will note from the portions that Mr. Glicksberg read that what they were trying to do was to get around—they couldn't make an agreement with the State Department, but trying to get around that agreement by some other and fraudulent way so far as our Government regulations and freezing orders and executive orders are concerned. We will bring that to Your Honor's attention later.

Mr. Glicksberg: The next exhibit introduced by the witness as a document of the company in his possession is F, which he captions: "Letter (to-

gether with an attached registered cover) dated September 6, 1948, from Director, Division of General Affairs, Ministry of Foreign Affairs, Japanese Government, to presidents, [161] Nippon Yusen Kabushki Kaisya, regarding problem of compensation for operation of repatriation vessels immediately prior to outbreak of Pacific war.”

Exhibit F is a six-page Japanese document with an envelope, have the envelope photostated, too, because it bears the date. The envelope from the translation shows the place, Marunouchi, addressed to Nippon Yusen Kabushki Kaisya by registered mail, special messenger, and is registration number 448.

“Slip attached to envelope face which is shown by second photostat of face of envelope reads:”

From “Tokyo Central Postoffice”. The reverse side of the envelope has the seal of the Secretary of Foreign Ministry Document Section, Ministry of Foreign Affairs.

The letter itself is a letter dated September 6, addressed to the president of Nippon Yusen Kabushki Kaisya and attaches to it a letter from the president of Nippon Yusen Kabushki Kaisya of August 30, 1948, to the Chief of the General Affairs Bureau, the Ministry, and I would like to read that first, and then read the reply.

The letter from the president, or from the Chief of Accountant Bureau of the NYK, which is a copy, which is attached to the original instrument, reads as follows:

The Court: Page?

Mr. Glicksberg: It is Exhibit F, only three pages here.

The Court: I am trying to think of the Reporter.
[162]

Mr. Saroyan: Page 3?

Mr. Glicksberg: It is page 2 and 3 of the exhibit.

“August 30, 1948.

“To Chief of General Affairs Bureau, Ministry of Foreign Affairs.

“Re: Compensation for losses resulting from operation of repatriated ships for Japanese Nationals in North America and Southern Region executed immediately prior to outbreak of Pacific war.

“With reference to the above caption, the view of this Bureau is as follows,”——

I am sorry, Your Honor please, this is not a letter, this is the Chief Accountants Bureau from the Ministry, it isn't the NYK's letter. It is a letter from the Chief Accountant Bureau of the Ministry to the Chief of the General Affairs Bureau of the Ministry.

The Court: Of Japan?

Mr. Glicksberg: Of Japan. And reading:

“With reference to the above caption, the view of this Bureau is as follows, and we shall appreciate your getting in touch with the Nippon Yusen Kaishiki Kaisha.

“I. Concerning North America.

“1. Nature of the requisition of October 10 for
[163] the ‘Tatatu Maru’, ‘Hikawata Maru’, and ‘Taiyo Maru’.

“As documents relating to the said requisition

order are untraceable, it is impossible to draw a clear conclusion as to the nature of this requisition; however, deducing from various circumstances it is believed that in nature the ships were requisitioned ones of the Japanese Government on account of the Freezing Order of Japanese funds by the United States, but their operation and the relevant accounts were at the responsibility and risk of the Nippon Yusen Kabushki Kaisha. The decision made by the Cabinet on September 30 was that: 'It is expected that there will be almost no loss coming from this navigation, because no cargo will be loaded though passengers are slated to be booked in full. Should a loss be incurred by chance the Government will compensate the loss after examination of the actual operation expenditure.' On the bases of this, Yusen actually received from the Ministry of Communications as subsidy the balance between the necessary expenses for the special navigation of ships for this case, and passenger fares and other revenues, the balance amounting to Y1,542,505.76 (July 7, 1942). This fact, indeed, testifies to the above views of this Bureau, and it is considered that the operations for this case were to be executed on the [164] account of the Yusen (Nippon Yusen Kabushki Kaisha). It was only to avoid the freezing of funds that part of the funds was administered as special accounts of the Consulates.

"2. Nature of the remittances from homeland by Yusen and the special account of the Consulates.

"Whereas the Yusen then had no available funds which were necessary in North America to operate

ships owing to the freezing of their funds, as an expedient funds amounting to Y520,959.99 were remitted by them to Consulates in America through the means of remittance by the Ministry of Foreign Affairs. Therefore, it should not be considered, as the side of Yusen asserts, that it advanced the funds that should have necessarily been remitted by the Government.

“Actually the special accounts of the Consulates were moneys belonging to Yusen and they only took the form of special Consular accounts owing to the Freezing Act.

“3. Since the stand of item Nos. 1 and 2 is taken, the amount of Y520,959.99 remitted should be considered as included in the balance of the special accounts of U. S. \$149,192.69 (equivalent to Y636,555.48 in Japanese currency exchanged at the rate of 23 7/16 as of December 6, 1941) of the Consulates in America and should be taken [165] into consideration in connection with the disposition of overseas assets and should not be paid immediately now.

“4. For reference, the Canadian money \$7,218.90 and the U. S. \$1,000 (Y31,636.91), which were appropriated to cover the expenses of the Consulate in Vancouver, should be taken into consideration together with the similar cases in the Southern Regions, and this, too, should not be paid immediately now.

“II. Concerning Southern Regions.

“For this navigation the operation was not executed as a requisitioned ship but in the usual man-

ner by Yusen and, therefore, should be disposed of as overseas assets. As for the special equipment expenses and demurrage, they cannot be taken into consideration because the Cabinet decision itself concerning the indemnity of losses is not clear."

Then on September 6 we have a letter with this instrument which I read attached to it written to the president of the Nippon Yusen Kabushki Kaisha under the seal of the Chief of General Affairs Bureau, Ministry of Foreign Affairs, dated September 6th, 1948, which reads as follows:

"To president, Nippon Yusen Kabushki Kaisha,

"Re: Compensation problem resulting from operation of repatriate ships executed immediately [166] prior to outbreak of Pacific War.

"With reference to the pending problem of compensation of the subject matter, it is understood that a decision was reached at that time by the Finance Ministry authorities whereby 520,959 yen, 99 sen, paid by you to this Ministry and transmitted to America would be dropped in accordance with the War Indemnity Special Measures Law and frozen funds other than the above would be handled as overseas assets. Against this decision, petitions were filed by your letters Ei-Gyo-Gai No. 19 of May 31 last year (1947) and Ei-Yu-Gai No. 53 of August 12. As a result of various negotiations conducted thereafter by this Ministry with the Finance Ministry, an answer has been received as views of the Accountant's Bureau that the aforementioned amount remitted to the U.S. too should not be governed by the War Indemnity Special Meas-

ures Law and essentially it should be taken into consideration in connection with the disposition of the Overseas Assets as part of the balance of the special account of the Consulates in America which is your company's funds. Details are as per the attached letter from the Accountant's Bureau. This Ministry has no objection to this and should like to appreciate your understanding on the matter." Signed by the Seal of the Chief of General Affairs Bureau, [167] Ministry of Foreign Affairs, September 6, 1948.

Mr. Saroyan: Your Honor please, in reference to Exhibit F, the objections are the same as those of E, but it should be pointed out that this document is dated September 6, 1948, and also August 30, 1948, more than six years after the transactions here involved, and simply another letter from the president of the NYK to the Foreign Ministry regarding compensation for operation of repatriation vessels. It is hearsay, self-serving, contains mere opinions and conclusions, is not a business entry, but a mere letter from a third party in reply to a settlement of a contractual relationship between NYK and the Japanese Government involving guarantee of any losses pertaining to Japanese requisitioned ships, or the Tatatu Maru. And for the most part its contents are completely foreign to the issues of this case, the issues of this case being as to who is the owner of the deposit of some \$66,000 standing in the name of Yoshio Muto in the Yokohama Specie Bank in San Francisco.

The Court: Take a recess.

(Whereupon an adjournment was taken until 2 o'clock p.m. this date.)

Afternoon Session, Thursday, April 12, 1951,

At 2 o'clock p.m.

Mr. Glicksberg: At the recess, Your Honor please, we had finished introducing Exhibit F. The witness in response to the same question then introduces an Exhibit G and H, both G and H. G the witness identifies as a debit note dated December 3, 1941, issued by the Chief, Finance Section, Finance Division, to president, Nippon Yusen Kaisha, in the sum of Y110,933.33 (\$26,000).

I am introducing them, Your Honor, please, without making too much mention because it has do with a subsequent voyage of the same vessel and was carried into the correspondence and the agreement between the Empire of Japan and the NYK, but it has no particular, it is no part of the fund over which the subject matter presently concerns itself, but I would like to have it introduced in evidence as the exhibit the witness has introduced without reading it.

Mr. Saroyan: Without repeating the objection, Your Honor, we assert the same objections to Exhibit G.

The Court: The record will so show.

Mr. de Lorimier: Same objection.

Mr. Glicksberg: The witness then introduces a receipt, Exhibit H, a receipt dated December 5, 1941, from Miyakichi Yamaguchi, Finance Section, Foreign Minister's Secretariat, to Mitsuzo Matsu-

moto, Chief, Finance Department, Nippon Yusen [169] Kabushki Kaisya, in the sum of Y110,933.33 (\$26,000.), which is the same thing from the previous exhibit except it is a receipt given to the NYK and the same explanation as given before, is not part of the subject matter of the fund here.

Mr. Saroyan: Same objection, Your Honor, with the further objection that I don't think counsel should clutter the record in this case with Exhibits G and H on the grounds that there is another suit pending in the Superior Court of this city and county pertaining to the \$26,000 represented by these two documents where the trustee of NYK is the plaintiff and Morris C. Sparling, Superintendent of Banks, is the defendant.

Mr. Glicksberg: No question about that. The witness has introduced these documents which connect up with all the settlements made with the Alien Property Custodian, which is one of the defendants here. Merely introducing as continuity of the subject matter, although stating to the Court they are not part of the fund.

Mr. Saroyan: If they aren't a part of the fund and have nothing to do with the subject, nothing allowing the witness to decide whether those documents have anything to do with the issues in this case, and I submit those two documents have nothing to do with the issues in this case.

The Court: I am inclined to agree with him.

Mr. Glicksberg: Except this, Your Honor please: Those particular documents tie in with the settlement of account which [170] was made between the

Japanese Government and the NYK, because the ultimate settlement in the previous exhibits included the \$26,000 which was sent for the next voyage of the Tatuta Maru.

The Court: Does that amount there include that \$26,000?

Mr. Glicksberg: The \$66,000 in question is exclusive of the \$26,000, only being introduced here because the witness has identified them.

The Court: All right.

Mr. Glicksberg: As part of the continuity of the records in his possession.

Mr. Saroyan: I submit, Your Honor, that \$26,000 counsel is referred to by Seishi Hiroyoshi are the issues involved in Superior Court action. Isn't that correct, Mr. Glicksberg?

Mr. Glicksberg: No question about it. I said to the Court they are not part of this particular subject matter, but introduced by the witness and we are introducing them here as part of his exhibits showing a continuity of the other exhibits.

The Court: Aside from showing the continuity it spells out nothing to me at the present time.

Mr. Glicksberg: The next question asked of the witness is Interrogatory No. 24, and the question is as follows:

"Are these documents written in Japanese? Can you translate them into English? (Introduce translations in evidence)."

The answer:— [171]

Mr. Saroyan: Mr. Glicksberg, did you skip I and J? Sorry for interrupting.

Mr. Glicksberg: Skipped?

Mr. Saroyan: You skipped two exhibits, did you not?

Mr. Glicksberg: No.

The Court: Which exhibit?

Mr. Glicksberg: No, I haven't skipped any exhibits. They will come in later in the subsequent interrogatories.

The answer: "To the 24th interrogatory, he sayeth: Yes. I wish to introduce in evidence translations of each of the documents mentioned in my answer to Interrogatory No. 23 above," which are Exhibits A through H, in translation, which are the same things we have introduced.

Interrogatory——

Mr. Saroyan: Same objection to the interrogatory.

Mr. Glicksberg: Interrogatory No. 25, "Q: Do any of the records of Nippon Yusen Kaisya, Tokyo office, refer to any action taken by Nippon Yusen Kaisya, Tokyo office, with reference to securing a final determination of the rights of Nippon Yusen Kaisya to moneys in a special account standing in the name of Yoshio Muto (the said Muto being Consul General of Japan at San Francisco) on deposit in the Yokohama Specie Bank, Ltd., San Francisco, in [172] which account there was a balance of \$66,892.65 as of December 7, 1941?"

It is the question. 25, the answer of the witness: "To the 25th Interrogatory, he sayeth: Yes."

Mr. Saroyan: Your Honor please, Interrogatory 25, we object to that interrogatory on the ground

that it calls for the opinion and conclusion of the witness, the record speaks for itself, and the further objection that the interrogatory is compound and also assumes something not in evidence, that is the balance of \$66,892.65, this interrogatory is remote, relates to NYK securing a final determination of the rights of NYK to the account. Now, that isn't permissible evidence, that is all hearsay.

The Court: I agree with you.

Mr. Glicksberg: Your Honor please, I don't know why I have to repeat—Your Honor has settled these interrogatories.

The Court: It doesn't matter, he can—under the procedure I can sustain objections to any of the interrogatories and regardless of what I may have done before.

Mr. Glicksberg: Sustaining an objection to this, why, I think Your Honor is without jurisdiction, once you have settled the interrogatories.

The Court: I am bound by them?

Mr. Glicksberg: Bound by the question, not by the answer. Bound by the question. The questions, Your Honor, this [173] Court has settled those interrogatories after objections and same objections which counsel is urging now, he urged them before Your Honor and Your Honor has ruled.

The Court: How can I determine when I didn't know what the answers would be?

Mr. Glicksberg: Not questioning, not determining that, we are determining the character of the question and Your Honor has allowed the question to be asked.

The Court: Yes.

Mr. Glicksberg: Your Honor may rule then at the trial as to the answer.

The Court: Yes.

Mr. Glicksberg: Counsel is making another objection to the form of the question. Under the rules he has no right to make them.

The Court: All right. Now, I will give you a record on that. I will sustain the objection to that interrogatory, so it will clear it up.

Mr. Glicksberg: All right.

Question No. 26, Interrogatory No. 26 (A): "Have you any record in your possession as Custodian of the records of Nippon Yusen Kaisya, Tokyo Office, which refer to a final decision made by the Empire of Japan, or any department thereof, as to the right of Nippon Yusen Kaisya to the money on deposit in said special [174] account standing in the name of Yoshio Muto and having a balance of \$66,892.65 as of December 7, 1941?" That is the question. The witness says: Answer: "To the 26th Interrogatory, he sayeth:

(A) Yes, I have. However the balance shown for San Francisco (two accounts for the Tatuta Maru) are, respectively: \$66,638.25 and \$26,000; and these two balances are parts of the total (covering several vessels) of \$149,192.69."

Mr. Saroyan: Your Honor please, same objection to 26(A). This interrogatory calls for the opinion and conclusion of the witness; the record speaks for itself; the question is irrelevant, incompetent, immaterial, not within the issues of this case as to

what decision might be made by the Empire of Japan as to NYK's rights. The question, if Your Honor will look at the interrogatory, reads:

"Have you any records in your possession as Custodian of the records of Nippon Yusen Kaisya, Tokyo office, which refer to a final decision made by the Empire of Japan, * * * "

How can that be binding on this Court as to what decision the Empire of Japan might have made?

The Court: Asks for a record—is there a record available?

Mr. Glicksberg: The witness said "Yes" in his answer. [175]

The Court: All right. That is the best evidence. Foundation hasn't been laid.

Mr. Saroyan: Everyone of my objections I have made, Your Honor, is on the ground without proper foundation.

The Court: Where is the document?

Mr. Glicksberg: The witness is going to testify and identify the documents that are in evidence now.

The Court: Proceed.

Mr. Glicksberg: "(b) If your answer to this question is in the affirmative, please identify and introduce such records in evidence."

Answer to 26, Interrogatory (b) is: "Please refer to documents 'D' and 'F' introduced in evidence under Interrogatory No. 23 above."

Interrogatory No. 27—

Mr. Saroyan: Just a minute.

Mr. Glicksberg: Yes, sir.

Mr. Saroyan: Your Honor, at this time I wish to interpose my objection to Interrogatory 26 (b) as the same objections that I heretofore made to D and F.

The Court: Let the record show.

Mr. Glicksberg: 27(a): "Have you any records in your possession as Custodian of the records of Nippon Yusen Kaisya, Tokyo Office, which refer to a final decision made by the Empire of Japan or any department thereof, [176] to the money on deposit in said special account standing in the name of Yoshio Muto and having a balance of \$66,892.65 as of December 7, 1941?"

Make your objection.

Mr. Saroyan: Objection there, Your Honor. Wish to call your attention to the fact that the witness is referring to a document that was prepared approximately six years after this transaction took place, No. 1. No. 2, that the interrogatory is identical to Interrogatory 26 and almost a duplicate to the Interrogatory, Your Honor, I believe just sustained our objection to.

Mr. Glicksberg: Let us not make statements, that is not true.

Mr. Saroyan: And Your Honor must refer to the question to see that it asks, which refers to a final decision made by the Empire of Japan or any department thereof as to the right of the Empire of Japan, or any department thereof, to the moneys on deposit in said special account standing in the name of Muto and having a balance of sixty-six thousand odd dollars as of December 7, 1941. This Court is

not bound by any decisions made by the Empire of Japan, not the best evidence.

The Court: I agree with counsel.

Mr. Glicksberg: If Your Honor please, only bear with me. The question is, have you any records?

The Court: Well, asking for a record, to give us a record [177] of a document made six years——

Mr. Glicksberg: If Your Honor please, here is a witness——

The Court: That is a self-serving declaration.

Mr. Glicksberg: No, if Your Honor please.

The Court: They in Japan making a determination as torights, that is what we are here for.

Mr. Glicksberg: No, the difference there, Your Honor, Mr. Saroyan has no business here. The determination in Japan is between the Empire——

The Court: Wait a minute, I want to follow you. He is here.

Mr. Glicksberg: He is only here as a stakeholder; the rights that are determined in Japan and between the predecessor of interest——

The Court: Yes.

Mr. Glicksberg: Or the Alien Property Custodian and the predecessor of interest, or Sterling Carr, who is representing the creditors.

The Court: I am mighty happy that a representative is here to be of assistance to the Court.

Mr. Glicksberg: I hope he is.

The Court: Undoubtedly he is and will be.

Mr. Glicksberg: Then, Your Honor please,——

The Court: I don't want to mislead you on this.

Mr. Glicksberg: Then we have here an arrange-

ment made and [178] settlements made between the two predecessors of interest, the principals, the original principals——

The Court: I understand that.

Mr. Glicksberg: ——as to whose fund the moneys, who has title as between themselves to this particular fund which is presently held by Mr. Sparling.

The Court: I understand that.

Mr. Glicksberg: Then when Your Honor makes a statement, with due deference to Your Honor's opinion that it is a self-serving document, it is for the benefit, it is for the purpose of this defendant to come in and refute it.

The Court: I am not concerned to whose benefit it is here at this time.

Mr. Glicksberg: Yes, but Your Honor, please, if two individuals predecessors in interest——

The Court: In understand.

Mr. Glicksberg: ——determined between themselves and as against their own interests determined the respective rights between themselves——

The Court: Yes.

Mr. Glicksberg: When that determination comes before this Court, with one of the defendants being here by a successor in interest——

The Court: Yes.

Mr. Glicksberg: ——legally it is our interpretation, and [179] humbly, in deference to Your Honor's opinion, that is a binding agreement between the parties.

The Court: You mean—give me an example of that in this case?

Mr. Glicksberg: Where the NYK in Tokyo and the Empire of Japan, through the exhibits on four occasions, have stipulated and agreed between themselves that the money here in the Yokohama Specie Bank is the money of the NYK and as such that agreement is admission against interest to the predecessor, or Mr. de Lorimier, and as such is binding upon the Alien Property Custodian.

The Court: Yes. I may accept that or reject it.

Mr. Glicksberg: Well, if Your Honor please, with all due deference to Your Honor's opinion, it is the theory of the plaintiff's case.

The Court: I understand your theory perfectly.

Mr. Glicksberg: Also standing here solely on behalf of the American creditors and not on behalf of the United States Government as Alien Property Custodian.

The Court: I understand that.

Mr. Glicksberg: Then may I come back to the one question which just says: "Have you any records?" and the character of records.

The Court: Take another step, the record made six years after this occurrence. [180]

Mr. Glicksberg: Your Honor please, let us—

The Court: Isn't that a fact or is it?

Mr. Glicksberg: No, 1942.

The Court: I understand that.

Mr. Glicksberg: 1943 and 1947.

The Court: 1943?

Mr. Glicksberg: 1942, there are records in 1942.

The Court: Only one as I recall.

Mr. Glicksberg: Well, if Your Honor please,—

The Court: One exhibit.

Mr. Glicksberg: If Your Honor please, there is a continuation of letters between, series between them.

The Court: Yes.

Mr. Glicksberg: The Empire of Japan and NYK in Tokyo.

The Court: Very well. Now, I have preached enough. Proceed.

Mr. Glicksberg: The answer to Interrogatory No. 27 which just states: Have you any records, and goes on and asks for the—not the NYK records, but have you any records in your possession as Custodian of the NYK, and so forth, which calls for a yes or no answer. That is all it calls for, and the witness answers: “Yes, I have.”

The Court: You already have read that into the record.

Mr. Glicksberg: But it just goes on: “However the balance shown”—— [181]

Just a slight difference, that is what he has testified to in reference to, in response to that question.

Now, 27(b) is: “If your answer to this question is in the affirmative, please identify and introduce such records in evidence.”

The witness answered to 27(b): “Please refer to documents ‘D’ and ‘F’ introduced in evidence under Interrogatory No. 23 above.”

In other words, he refers to the documents which have been introduced.

The Court: D and F?

Mr. Glicksberg: D and F.

Mr. Saroyan: That is one we raised objection to, Your Honor. D is a document dated November 26th, 1943, approximately 26 months after the transaction took place, and it is entitled: "From Director of the Political Affairs Bureau, the Ministry of Foreign Affairs, to the president of NYK." It is a one, two, three—a seven-page document.

Mr. Glicksberg: That is right.

Mr. Saroyan: I believe Mr. Glicksberg read the entire document into evidence. And then F is a document dated September 6, 1948. Let me say now they were in improper order in the exhibit itself. Mr. Glicksberg read a letter first that was written by the Chief of the Accountant Bureau, referred back to the letter of August 3 and September 6. [182]

The Court: Yes, I know.

Mr. Saroyan: Same objection.

The Court: Note the objection for the record.

Mr. Glicksberg: Interrogatory No. 28 (a):

"Have you any records in your possession as Custodian of the records of Nippon Yusen Kaisya, Tokyo office, which refer to a final decision made by the Empire of Japan, or any department thereof, as to the right of Yoshio Muto, Consul General of Japan at San Francisco, to the money on deposit in said special account standing in the name of said Yoshio Muto and having a balance of \$66,892.65 as of December 7, 1941?"

To the 28th Interrogatory (a) he sayeth:

"Yes, I have, except that the figure is \$66,638.25

instead of that which is given in Interrogatory No. 28(a)." \$66,892.65.

Interrogatory No. 28(b):

"If your answer to this question is in the affirmative, please identify and introduce such records in evidence." Answer to 28(b):

"Please refer to documents 'D' and 'F' introduced in evidence under Interrogatory No. 23 above."

Mr. Saroyan: Your Honor please, we assert here the same objection as raised to Interrogatories 26 and 27. Your Honor will note that this Interrogatory refers to the determination of [183] Yoshio Muto's rights. What counsel is trying to ask, is to make Hiroyoshi, the witness, as the Court to determine the rights as to whether Yoshio Muto is entitled to this account or not, which is the province of this Court, so far as I understand.

The Court: Note the objection.

Mr. Glicksberg: The only answer to reply is that Your Honor will have to determine the weight of the particular exhibits. Mr. Hiroyoshi is just introducing them when I asked him if he had any exhibits to refer to and he said yes, that these are the exhibits which we are talking about. The relative weight or merits Your Honor will have to determine, the value given to this particular exhibits.

Interrogatory No. 29:

"If any documents produced pursuant to the foregoing three questions have been introduced in evidence, please call the Court's attention to any specific portion of said documents from the Empire of

Japan, or any of its departments, as to the status of the account known as 'Yoshio Muto-Special Account' on deposit with the Yokohama Specie Bank, Ltd., San Francisco, with balance as of December 7, 1941 of \$66,892.65."

Answer to Interrogatory No. 29, the witness sayeth:

"The Court's attention is respectfully invited to that [184] portion of official letter Sei-Schichi Fut-suu No. 362 (Exhibit 'D'), which begins:

'(1) San Francisco (Tatuta Maru) a. 1—balance \$66,638.25.' "

And then a portion is left out, and then goes on:

"And ends' . . . expenditure \$38,650, balance \$66,750.'

"It may be noted that figure quoted above agrees precisely with figure, \$66,892.65, given under **Interrogatory No. 29.**"

Mr. Saroyan: Your Honor please, this interrogatory refers, the answer refers to that document dated November 26, 1943, as Exhibit D, and we assert the same objection as to the prior Interrogatories.

Mr. Glicksberg: Interrogatory No. 30 (a):

"Are you familiar with the seals of the various Departments of the Empire of Japan?"

The answer to the 30th Interrogatory, the witness sayeth:

"(a). Although I am familiar with certain seals which pertain to the subject matter given in this deposition, I cannot claim to be familiar with the

seals of the various department of Government of the Empire of Japan.”

And you object to that, too?

Mr. Saroyan: Yes. Your Honor, object to that on the [185] grounds that the witness says he doesn't know anything about the seals of the Empire of Japan and ask that the answer be stricken from the record.

The Court: No objection? I try to steady you gentlemen. I am afraid the latitude I am permitting here——

Mr. Glicksberg: Mainly, Your Honor, I will have to object to it merely because it is an answer in the negative, which is——

The Court: I understand. Proceed.

Mr. Glicksberg: 30(b): “If your answer to Interrogatory No. 30(a) is in the affirmative, is there a seal on the document introduced in response to Interrogatory No. 29?”

Answer: “Yes, there is.”

Mr. Saroyan: Same objection, Your Honor.

The Court: Same ruling.

Mr. Glicksberg: Interrogatory 30(d):

“Are you familiar with the signature on this document?”

The Court: This document is dated February, 1943?

Mr. Glicksberg: I can't, Your Honor—we have to go back to Interrogatory 29, is a whole series of Interrogatories.

The Court: Well, if you can't go back.

Mr. Glicksberg: It is Exhibit D.

Mr. Saroyan: Your Honor, I am lost at the moment, too.

Mr. Glicksberg: November 26, 1943. [186]

The Court: That's what I thought; that is the reason I asked.

Mr. Saroyan: He admitted the Interrogatory——

Mr. Glicksberg: Will you please allow me to read?

Mr. Saroyan: I am sorry, Mr. Glicksberg.

The Court: Don't interfere with counsel.

Mr. Glicksberg: I will proceed.

“(c) If your response to Interrogatories No. 29 and No. 30(a) and 30(b) is in the affirmative, can you identify the seal on this document as one of an official of some department of the Empire of Japan?” Answer: “Yes, I can.”

Mr. Saroyan: Incompetent, irrelevant and immaterial, whether he can identify it or not. Serves no useful purpose, has nothing to do with the issues of this case.

Mr. Glicksberg: “30(d) Are you familiar with the signature on this document?”

Answer to 30(d): “In accordance with Japanese custom no signature is appended, but the document bears an impression of an official seal.”

“30(e) If the answers to Interrogatories 29 and 30(d) are in the affirmative, please state if this signature is one of an official of a department of the Empire of Japan.

Assuming that any documents of the Empire of Japan, [187] or any of its departments, have been

introduced in evidence, please identify the seals, if any, affixed thereto, if you can do so."

Answer to: "(1) Exhibit 'D'."

He identifies Exhibit D as the "Seal of Director, Political Affairs Bureau, Ministry of Foreign Affairs."

To Exhibit F; it is the "Official seal, General Affairs Division, Ministry of Foreign Affairs, and (3) Exhibit 'E'." which is the "Seal of Ministry of Foreign Affairs."

Mr. Saroyan: I ask that the whole answer be stricken, Your Honor, on the grounds that the witness is not a proper witness to testify as to the seals of the Empire of Japan. The man appears to be a man connected with NYK; how could he take the stand and testify to the seals of the Government?

The Court: Maybe counsel can explain it.

Mr. Glicksberg: The witness was asked whether he can identify the particular seals. The witness testified he can. Counsel, in his cross-interrogatories, would have an opportunity to inquire as to his qualifications whether he could or could not. The man testifies under oath he can identify them and then proceeds to identify them and say and state to this particular court whose seals these particular documents bear. Why counsel——

The Court: Don't need to go so far as to say that he is an incompetent witness under the interrogatories. [188]

Mr. Glicksberg: With all due respect to Your Honor, I think he is an extremely competent witness.

The Court: Foundation hasn't been laid.

Mr. Glicksberg: If Your Honor please, here is a Custodian who has possession of documents and the records of the company in the course of business. He presents them to this particular Court by way of deposition, then states he can identify the signature, or a man's seal, and if he asks if this is Mr. Glicksberg's signature and he says yes,—

The Court: I am not—I will not bother or worry very much about the seal. I don't think it goes to the merits of this case, gentlemen. Proceed.

Mr. Glicksberg: 31: "Do any of the records of Nippon Yusen Kaisya, Tokyo office, in your possession evidence an advance of money by Nippon Yusen Kaisya, Tokyo office, to any department of the Japanese Government for transfer to the United States to be used to defray costs of the return voyage to Japan of the Tatuta Maru arriving in San Francisco in October, 1941?"

Answer to the 31st Interrogatory the witness says: "Yes, I have."

32:—

Mr. Saroyan: Just a minute. Interrogatory No. 31, Your Honor, asks for the opinion and conclusion of the witness. I don't think it is the best evidence. The record should speak [189] for itself. This interrogatory pertains to the records of NYK which evidenced an advance of money by NYK to the Foreign Ministry office of the Japanese Government, and the witness says he does have such records. Well, if he does, we submit that it might create a debtor-creditor relationship between the

two, but it is incompetent, irrelevant and immaterial as far as the issues of this case are concerned, because it has nothing to do with this transaction.

Mr. Glicksberg: My reply, the question was, do you have any records—the answer is: “Yes, I have.”

The Court: I thought to save time you were to have a running objection.

Mr. Saroyan: To all of this line of testimony.

The Court: And I indicated, tried to indicate clearly you didn't waive any of your legal rights and when we come to discuss this matter and I am expected to rule on a motion to strike or sustain your objection, I will do it at the proper time when we make up the record; is that agreeable?

Mr. Glicksberg: Perfectly.

Mr. Saroyan: I think in the interests of time, probably——

The Court: Probably do better.

Mr. de Lorimier: Of course, that applies to myself, too.

The Court: Very well.

Mr. Glicksberg: 32: “If your answer to Interrogatory No. 31 is in the affirmative, please identify and [190] introduce in evidence the records, books and accounts reflecting such advances of moneys to defray the costs of said return voyage to Japan of the *Tatuta Maru* arriving in San Francisco during October, 1941.” Answer to the 32nd Interrogatory, answer is as follows:

“Reference is made to documents ‘A’, ‘B’, ‘C’, and ‘D’ introduced in evidence under Interrogatory No. 23, wherein it is shown that \$39,000 was trans-

mitted to the Consul General at San Francisco for payment of expenses of Tatuta Maru.”

33: “If the answer to Interrogatory No. 31 is in the affirmative, and if any records, books and/or accounts have been introduced in response to Interrogatory No. 32, please refer to such records, books and/or accounts and state from the same to what department of the Japanese Government were these funds delivered.”

Answer to the 33rd Interrogatory:

“Reference is made to document ‘B’ introduced in evidence under Interrogatory No. 23 above, in which it is shown that the Foreign Ministry on October 20, 1941, received from the Accounting Department, Nippon Yusen Kabushki Kaisya, the sum of \$39,000 and transmitted that amount to the Consul General at San Francisco for payment of expenses of Tatuta Maru.”

Interrogatory No. 34: “Do you have in your possession [191] any receipt from the Japanese Government or any of its departments for the delivery of such funds by Nippon Yusen Kaisya, Tokyo office to the Japanese Government or any of its departments?”

Answer to the 34th Interrogatory: “Yes, I do.”

Interrogatory No. 35: “From the books and records of Nippon Yusen Kaisya, Tokyo office previously introduced in evidence, please state how much money was delivered by Nippon Yusen Kaisya, Tokyo office to the Japanese Imperial Government or any department thereof, on account of said voyage of said Tatuta Maru.”

Answer: "\$39,000."

36th Interrogatory: "Have you had an opportunity to search the books and records of Nippon Yusen Kaisya, Tokyo office, pertaining to the Tatuta Maru, voyage 69-Home, to determine whether any payments of passenger fares have been made in Japan by individuals who returned to Japan on said voyage during November, 1941?"

Answer: "Yes, I have had such opportunity and have determined that passenger fares have been paid in Japan by and/or for individuals who returned on the Tatuta Maru during November, 1941."

Question 37: "What have you found?"

Answer to 37: "Refer to the book known as 'Accounts of [192] Special Vessels used in repatriation'."

38: "Where did you find this record?"

Answer to 38th Interrogatory: "This book is a part of the company's general suspense account and was found among the records of the Tokyo office of the Nippon Yusen Kaisya."

Interrogatory No. 39: "On what page of this record is reference made to the Tatuta Maru, Voyage 69-H? (The original book, or a photostat copy of the page or pages referred to, authenticated by the person before whom the deposition is being taken, to be introduced in evidence)."

That is a question with instructions. The answer to 39 states as follows: "I wish to introduce in evidence a certified photostat"——

He calls it Exhibit I——"of a portion of the volume entitled 'Accounts of Special vessels used in

repatriation' on page 63 ff. of which reference is made to the 'Tatuta Maru voyage 69-H.'"

We would like to introduce at the present time, if Your Honor please, this page of this book which the witness has identified and had photostated as the next exhibit in order as one of the records.

The Court: What does that purport to disclose?

Mr. Glicksberg: It purports to disclose the receipt by [193] NYK, Tokyo, of passenger fares for people who travelled on this particular vessel that were paid in Japan to NYK, not to the Empire of Japan.

Now, this document——

The Court: Shows that they were acting as agents for the Empire of Japan.

Mr. Glicksberg: Because the money never went to the Empire of Japan.

Mr. Saroyan: You mean NYK, Your Honor.

The Court: Yes.

Mr. Saroyan: That is what we are in a position to show, an agency fee, paid \$4,771 pursuant to an application and a license issued by the Treasury Department——

The Court: I just made an inquiry, I don't want to dispose of the case this afternoon.

Mr. Saroyan: One minute, Your Honor,——

Mr. Glicksberg: Are you back again, or have we agreed that we can proceed?

The Court: If there is any additional—he is entitled to a record, but I am sure that it will be brief.

Mr. Glicksberg: How could it be brief?

Mr. Saroyan: Exhibit I. As to Exhibit I it is a page taken from a book, so that the record will be

clear, it is merely an attempt, Exhibit I, to show an accounting by NYK Tokyo for the expense of the Tatuta Maru voyage, and also it is [194] irrelevant to the issues of this case, and there is no attempt made to tie up with the money actually received in the Yoshio Muto special account in the Yokohama Specie Bank of the San Francisco office.

The Court: I gave you a brief opportunity to relate—I hoped that we could go along here. I am afraid we are all nervous, seems to be an atmosphere all over the world.

Mr. Saroyan: Your Honor, please, I have one further objection, told you—just a minute, Mr. Glicksberg. I have one objection to make, separate objection to make to all interrogatories from 36 to 45, but I will make it after he has read——

The Court: Very well. You may proceed, counsel.

Mr. Glicksberg: The two sheets of that book termed:

“Accounts of Special Vessels used in Repatriation” in Japanese showing a debit and credit column, that is purported to be pages 63 and 64 of the book.

The translation on page 63 shows under the credit column an entry of 10/31/1941: “U. S. Alien Head Tax, San Francisco \$2,832.79.

“U. S. Alien Head Tax, Los Angeles, \$170.65.

“Honolulu, \$68.26, and San Francisco, \$238.91. (Yokohama Report No. 68 Reports San Francisco \$34.13.)”

Then we come down under the entry of 11/30—November 30, we have passage money and we have

Yokohama, C/R/429 Yokohama/Honolulu, Mr. and Mrs. M. Sato, \$2.13; Mr. M. Uehara, [195] \$21.33; Mr. M. Nishimura, \$21.33; Yokohama/Honolulu/San Francisco, \$23,435.55, and a whole series of figures which the witness has included by a breakdown showing \$24,720.13 was paid at Honolulu—in Tokyo by passengers on this vessel that have given I. O. U.'s, or, according to the records we have introduced, obligated themselves to pay in Tokyo.

On page 64 we likewise have under passage money \$1,080.74 and the name of the respective passengers who travelled, which corresponds with the list that we have introduced here in the passengers——

Mr. Saroyan: May I ask Mr. Glicksberg a question at this point, Your Honor?

Mr. Glicksberg: No, you can't ask me, I'm tired—please.

Mr. Saroyan: You have been testifying, Mr. Glicksberg.

Mr. Glicksberg: I am reading, I am reading, Mr. Saroyan.

Mr. Saroyan: You said something about an I. O. U. Will you please—could I ask the Reporter to read that portion? How much what did you testify to, how much is it, how much?

The Court: How much, counsel?

Mr. Glicksberg: Reading from the exhibit.

The Court: Reading from the exhibit, I don't recall that.

Mr. Glicksberg: I read \$24,720.13 on the reverse side, and the next page, \$1,080.74.

Mr. Saroyan: Both of those are I. O. U.'s?

Mr. Glicksberg: No, no. The records show they were payments [196] made NYK in Tokyo, have in their records receipts for that money for passages which have been booked and paid in Tokyo.

The Court: He got confused by those two or three passengers that you mentioned awhile ago.

Mr. Glicksberg: Just mentioned a few names.

The Court: Just mentioned a few names, maybe that is what confused you.

Mr. Saroyan: Maybe it did, thought they were doing business on an I. O. U. basis.

The Court: Proceed.

Mr. Glicksberg: I am sorry, I am not qualified to testify.

Interrogatory No. 40: "You stated that the Tatuta Maru, Voyage 69-H, was referred to on page 63 of this record. What is stated on page 63?"

The witness, in answer to the 40th Interrogatory, states: "Beginning with the 23rd line on page 63 there appear entries showing payments in Japan by individuals, banks, firms, etc., covering return passage to Japan by the Tatuta Maru Voyage 69-H."

The Court: What amount?

Mr. Glicksberg: I think the next question will state the amount.

The Court: I beg your pardon.

Mr. Glicksberg: Question 41: "Please state the names of persons or companies as they appear in said record [197] and the amount paid by each."

To the 41st Interrogatory the witness testifies:

"November 30, 1941. Mitsubishi Bank 2,967.07.

Mr. T. Kondo, 1,276.59. Trade Bureau, Ministry of Commerce and Industry, 1,450.67. Mr. U. Oka, 1,233.07. Nissho Company, Limited, 1,450.67. Mr. T. Onuma and family, 2,624.00. Mr. M. Shinohara, 870.40. Yokohama Specie Bank, 4,352.00."

And the witness states on page 64: "East Asia Travel Bureau, 2,538.67."

The Court: Pardon me, counsel, aside from the record what was that \$4,000 paid for, that credit paid out? Here locally? You may go off the record if you wish. I want to follow the testimony. If you can.

(Off-the-record discussion.)

The Court: Give him an opportunity, please.

Mr. Glicksberg: "Page 64: East Asia Travel Bureau, 2,538.67. Mr. F. Maeda, 1,732.27. Bank of Japan, 1,450.67. Toyo Menka K. K. 4,352.00. Kawasaki Line, 1,450.67. Mitsui Bussan K. K. 11,605.33. [198] Yokohama Specie Bank, 2,331.34. Mitsui Bank, 2,961.07. Sumitomo Bank, 1,450.67."

Mr. Saroyan: May I ask my question now?

Mr. Glicksberg: No, as soon as I am through I will be delighted. I am sorry, Your Honor, if I appear a bit——

The Court: Proceed.

Mr. Glicksberg: Interrogatory No. 42:

"Are these amounts stated in Japanese yen?"

To the 42nd Interrogatory he sayeth:

"Yes, they are."

Interrogatory 43:

"If any such payments were made to Nippon

Yusen Kaisya, Tokyo office, please refer to the books and records which have been introduced in evidence and state when the payments were made and identify the same from the records."

To the 43rd Interrogatory, the witness stated:

"I wish to refer to original credit note dated September 18, 1942, and introduce into evidence a certified photostat thereof (Exhibit J), wherein it is shown that on September 18, 1942, there was paid to the Tokyo office, Nippon Yusen Kaisya, the sum of \$205. (yen 874.67) by one Minoru Ikoma for 2nd-class passage from San Francisco to Yokohama aboard the [199] repatriation ship, Tatuta Maru."

The witness then introduces: "J", which is a record in Japanese which I would like to introduce at the present time which reads as follows:

"Certificate of receipt and payment.

September 18, 1942.

To the president of company.

The sum of eight hundred and seventy-four yen and sixty-seven sen only (Y874.67).

Passage money from Mr. Goro Fukuyama, assistant professor at Hokkaido Imperial University, a 2nd-cabin passenger aboard the Tatuta Maru, a requisitioned vessel.

U. S. \$205.00.

Title of accounts, accounts Sec NYK, cash received.

I do hereby pay the above-mentioned sum."

And then we have the seal of the chief officer in charge of passengers, Minoru Ikoma.

Question No. 44:

"If any such payments were made to Nippon Yusen Kaisya, Tokyo office, please refer to the books and records which have been introduced in evidence and state where the payments were made and identify the same from the records."

To the 44th Interrogatory the witness testifies, quoting: "Refer to Exhibit 'J' above and note that payment was made [200] to the Mitsubishi Bank Branch Office, Marunouchi Building, Tokyo, September 19, 1942."

Interrogatory No. 45:

"Did Nippon Yusen Kaisya, Tokyo office, retain the payments referred to in Interrogatory No. 41 as its own funds?"

The witness testified:

"Yes. It did."

Mr. Saroyan: Your Honor, at this point here now I wish to make a further objection to all interrogatories from 36 to 45 that pertain to payment of passengers' fare to NYK Tokyo after the outbreak of war. It is the defendant's contention that that is irrelevant and immaterial so far as the issues of this case are concerned. How can that have any relevancy or materiality so far as this ownership of this account as to what fares were paid by passengers in Tokyo to NYK after the war started? Further, on the grounds that the records pertaining to NYK speak for themselves and that is the best evidence.

The Court: Let the record so show.

Mr. Glicksberg: Interrogatory No. 26:

"Do any documents in your possession show

whether the Imperial Japanese Government or any department thereof objected to the retention by Nippon Yusen Kaisya, Tokyo office, of such passenger fares paid Nippon Yusen Kaisya, Tokyo office, or made any claim to such funds?" [201]

The 46th Interrogatory, the witness testified:

"I have not found among the documents in my possession any that show that the Imperial Japanese Government or any department thereof has made objection to the retention by the Nippon Yusen Kaisya, Tokyo office, of such passage fares paid to that office, or that the Imperial Japanese Government has made claim to such funds."

The Court: That concludes——

Mr. Glicksberg: Concludes the interrogatories. And there are several cross-interrogatories.

The Court: We will take a recess for a few minutes.

(Short recess.)

Mr. Glicksberg: You want to read your cross-examination?

Mr. Saroyan: I want to ask a question.

Mr. Glicksberg: You want to read your cross-interrogatories, or do you suggest I proceed to read the questions and answers?

Mr. Saroyan: As far as the cross-interrogatories are concerned, Your Honor, we don't believe they have any relevancy or materiality to the issues of this case. We don't believe that there is proper foundation laid for the cross-interrogatories and believe it is reeking with hearsay; for this reason at

this time we don't wish to offer in evidence——

Mr. Glicksberg: I will offer them in evidence, if Your Honor please. [202]

Mr. Saroyan: Through the Court could I——

Mr. Glicksberg: One moment.

Mr. Saroyan: Just a moment, Mr. Glicksberg. Through the Court may I ask one question of Mr. Glicksberg. He was reading from Interrogatory No. 41, it says Yokohama Specie Bank 4,352.00—one item, and Yokohama Specie Bank 2,331.34, the second item.

Mr. Glicksberg, can you tell me whether you know from any records that we might have what those items cover?

Mr. Glicksberg: Passenger fare of members of the branches here that went back on this vessel and they gave letters to the NYK here that payment would be made in Tokyo by their respective firms to the NYK.

Mr. Saroyan: You have a record of it?

Mr. Glicksberg: We have letters to have effect.

Mr. Saroyan: You mean in evidence?

Mr. Glicksberg: No. You want me to introduce them?

Mr. Saroyan: Don't mean very much in here.

Mr. Glicksberg: I have them.

The Court: Proceed, gentlemen. Proceed.

Mr. Glicksberg: These cross-interrogatories were propounded on behalf of the defendant Morris C. Sparling, superintendent of banks of the State of California, as liquidator of the Yokohama Specie Bank, Ltd., San Francisco, and cross-interrogatory

No. 1: "During the period January, 1932 to [203] January, 1942, did you work or reside in any place other than New York?"

Answer to cross-interrogatory of defendant Morris C. Sparling: "Yes, I did."

Interrogatory 2(a): "Were you in Japan at any time during the year 1941?"

Answer: "No."

2(b): "Were you in San Francisco, California, during the same year?"

The answer to (b) is "Yes."

"Did you have any business dealings with the Yokohama Specie Bank, Ltd., San Francisco office?"

Answer to (a) is "No."

Answer to (b) is "No."

"During the year 1941, did you personally have any communications with the Yokohama Specie Bank, Ltd., San Francisco office? If so, please attach to your answer copies of any such correspondence."

Answer to the third cross-interrogatory: "No."

Interrogatory No. 4:

"As an accountant in the New York office of the Nippon Yusen Kaisya, did your duties include the participation [204] in any agreements supposedly reached between Nippon Yusen Kaisya, and the Japanese Government relative to the account of the Japanese Consul General, San Francisco office of the Yokohama Specie Bank, Ltd.?"

Answer: "No."

Interrogatory, cross-interrogatory 5:

“Is it not true that your statements concerning the alleged agreement between the Japanese Government and Nippon Yusen Kaisya are based solely on records and letters brought to your attention since August, 1942, the date you commenced working in the Tokyo office of the Nippon Yusen Kaisya?”

Answer: “Yes, it is true.”

Interrogatory 6:

“Is it not also true that you were never a party to, and have no personal knowledge of any alleged agreements reached by you and among Nippon Yusen Kaisya, the Japanese Government, and the Yokohama Specie Bank, relative to the account of the Japanese Consul General, San Francisco office of the Yokohama Specie Bank?”

Answer to this question: “Yes, that is also true.”

Interrogatory No. 7:

“In the records, books, letter or other memoranda that came into your possession since the date of your [205] employment in the Tokyo office of Nippon Yusen Kaisya, is there any evidence that the Yokohama Specie Bank of San Francisco had knowledge of any alleged agreement between the Japanese Government and Nippon Yusen Kaisya relative to money being held in the San Francisco account of the Japanese Consul General in the San Francisco office of the Yokohama Specie Bank, Ltd., for the benefit of Nippon Yusen Kaisya?”

7: “No, there is no such evidence.”

Mr. Saroyan: From this point on will the record show that from Interrogatory 8 down to 14, that is

inclusive, we object on all grounds that I have heretofore imposed, there is no proper foundation made, laid, no relevancy or materiality; all hearsay evidence.

Mr. Glicksberg: Your Honor please, let me call to the Court's attention that these are questions propounded by Mr. Saroyan.

The Court: I understand.

Mr. Saroyan: You're introducing them, Mr. Glicksberg.

Mr. Glicksberg: I am introducing the exhibits.

Mr. Saroyan: You are the one making the motion to take the interrogatories.

Mr. Glicksberg: That is right. Interrogatory 8(a):

"From what source did you get the information that certain money was advanced by Nippon Yusen Kaisya [206] to the Japanese Government and deposited in the Yokohama Specie Bank, Ltd., San Francisco office, to defray the costs of the voyage of the Tatuta Maru arriving in San Francisco in October, 1941?"

Answer: "I obtained that information from the records of the Nippon Yusen Kaisya, Tokyo office, specifically:

(1) From an application for approval to purchase foreign exchange notes and a permit for purchasing foreign exchange notes (Exhibit 'A');

(2) From a provisional receipt dated October 21, 1941 (Exhibit 'B'); (3) From a debit note (Exhibit 'C'); and

(4) From a letter dated November 26, 1943 (Ex-

hibit 'D'); as well as from personal conversations with Mr. Taichiro Shimasaki, chief accountant, San Francisco office, Nippon Yusen Kaisya, who returned to Japan with me aboard the repatriation vessel, Asama Maru." B, 8(b), question: "Was there a written agreement to that effect? If so, identify it and offer it as evidence."

The answer to this question, Mr. Saroyan's, is as follows:

(b) The witness' testimony: "While Japanese procedure did not call for a written agreement in this [207] case, the facts are as is shown by documents 'A' through 'H' presented in evidence under Interrogatory No. 23 above."

Cross-interrogatory No. 9:

"Where did you get the information, if any, as to the present whereabouts of the deposit of money that was advanced to the Japanese Government by Nippon Yusen Kaisya?"

To the 9th cross-interrogatory the witness replied:

"From the information contained in the various documents presented in evidence (Exhibits 'A' through 'H') it is shown that the money was deposited in the San Francisco branch of the Yokohama Specie Bank and, inasmuch as the treaty of peace has not been signed, it is believed that the funds yet remain in that bank."

Cross-interrogatory 10:

"How do you know that various amounts of money were paid to Nippon Yusen Kaisya during the month of November, 1941, for passenger fares?"

Answer to the cross-interrogatory:

“The records, particularly the company’s general suspense account (see Exhibit ‘I’), of the Tokyo office of the Nippon Yusen Kaisya, show, on page 63 ff. of that volume, that various amounts of money were [208] paid to Nippon Yusen Kaisya during November, 1941 for passenger fares.”

Cross-interrogatory No. 11:

“How do you know that the Japanese Empire and the Ministry of Finance knew of such payments?”

Answer to the 11th Interrogatory the witness testifies:

“I know that the Japanese Government including the Ministry of Finance knew of such payments because that fact is borne out by the content, particularly sub-heads 1 and 4 under part I, of the document entitled ‘Details of Special Assignment of Vessels to America’, dated December, 1943, and submitted in evidence as document ‘E’ under Interrogatory No. 23 (Exhibit ‘E’).”

Cross-Interrogatory No. 12:

“Referring to Interrogatory No. 21, where did you obtain your information as to the steps allegedly taken by Nippon Yusen Kaisya?”

Answering cross-interrogatory 12, the witness testifies:

“This information was obtained through perusal of correspondence between Nippon Yusen Kaisya, head office, Tokyo, and the Ministry of Foreign Affairs.”

Interrogatory No. 13—cross-interrogatory No. 13:

“Referring to interrogatory No. 25, how do you

know that [209] the seal is that of the Japanese Government and the signature is that of an official of the Japanese Government?"

To the 13th cross-interrogatory the witness testified:

"With reference to Interrogatory No. 25 I fail to comprehend what is meant by this cross-interrogatory. However, it may be stated that in general the Japanese Government causes official seals to be affixed to official documents, and that it is seldom that a Japanese Government official affixes an official signature to such documents."

Cross-interrogatory No. 14:

"Are there any documents or records other than the ones heretofore identified and offered as evidence by you, upon which your answers to the interrogatories and cross-interrogatories are based? If so, please identify them and offer them as evidence."

Answer to *fourth* cross-interrogatory, the witness testifies as follows:

"While there may be other documents and records contained in the files of the Tokyo office of the Nippon Yusen Kaisya, from perusal of which information was gained upon which my answers to the interrogatories and cross-interrogatories are based, documents already introduced in evidence fully and satisfactorily cover [210] the matter, and it is impracticable to identify and offer in evidence additional records or records."

Signed Seishi Hiroyoshi, by his seal.

Then we have the certificate of Glen Bruner, Consul of the United States of America, at Tokyo,

Japan, which we may dispose of reading as having been read.

Mr. Wilson.

HAROLD F. WILSON,

called as a witness on behalf of the plaintiff, sworn:

The Clerk: Q. Will you state your full name and occupation to the Court?

A. Harold F. Wilson, special deputy, superintendent of banks, State of California.

The Court: Q. How long have you been so engaged?

The Witness: Since 1941, Your Honor.

Direct Examination

Mr. Glicksberg: Q. Mr. Wilson, you have had an opportunity to examine the records of the Yokohama Specie Bank here in San Francisco, haven't you?

A. Yes, sir.

Q. December, 1941, and as such you examined them as an employee of the superintendent of banks?

A. Yes, sir.

Q. And in examining these records have you found a ledger account, or an account under the name of Yoshio Muto, Consul [211] General of Japan, special account?

A. Yes, sir. I have the original ledger sheet taken from the records of the bank.

Mr. Glicksberg: The witness has delivered to me a loose-leaf ledger account.

The Court: More than one?

The Witness: Yes, there is; Your Honor, there is.

(Testimony of Harold F. Wilson.)

The Court: Only one of a number.

The Witness: May I explain, sir?

The Court: Yes.

The Witness: There is only one account, Consul General, Yoshio Muto special account; there are other accounts in the name of the Consul General, sir.

The Court: All right.

Mr. Glicksberg: I presume, Mr. Saroyan, you have no objection to introducing——

Mr. Saroyan: No objection whatever. It is my understanding that the original will be withdrawn and a copy will be substituted.

Mr. Glicksberg: No objection.

The Clerk: Plaintiff's Exhibit 21.

The Court: Don't mark it in evidence, they want to substitute a copy. Have you a copy there now?

Mr. Saroyan: Just compare it for a minute, Mr. Glicksberg, so there won't—— [212]

Mr. Glicksberg: Subject to any corrections.

Mr. Saroyan: Wait a minute, now, just a minute.

Mr. Glicksberg: Subject to any——

Mr. Saroyan: Just a minute, please. Is there a second page to this account, Mr. Wilson?

The Witness: Yes, there is.

The Court: Let the copies be admitted and marked.

Mr. Glicksberg: Yes, Your Honor.

The Clerk: Plaintiff's Exhibit 21.

(Testimony of Harold F. Wilson.)

(Whereupon the ledger sheets above referred to, marked plaintiff's Exhibit 21, were received in evidence.)

Mr. Glicksberg: May it also be stipulated the witness can withdraw the original?

The Court: Glad you gentlemen are smiling at each other. That is helpful.

Mr. Saroyan: The reason I am smiling, he didn't furnish me with copies, but he expects a copy from me.

Mr. Glicksberg: We are a bankrupt, can't afford——

Q. Mr. Wilson, when was this account opened up, as of what date?

A. October 29, 1941.

Q. And by what deposit?

A. \$39,000.

Q. Have you any record where that \$39,000 came from?

A. I have. I have a copy of an application made by the [213] Consulate General of Japan at San Francisco, 22 Battery Street, San Francisco, California, U.S.A.

The Court: Dated?

The Witness: Dated—this copy, sir, does not have a date other than October, 1941 on it. This is not the original, this is merely a copy.

The Court: I understand.

Mr. Glicksberg: Q. I am not as technical, there

(Testimony of Harold F. Wilson.)

was an application that was made to receive it in the account.

Mr. Saroyan: Mr. Glicksberg, you want to compare with this authenticated copy from the Department of Justice in Washington? If it is an identical document, I can give you this to offer so that you can offer this in evidence.

Mr. Glicksberg: I am going to object to a portion of it. It appears that there are two characters of typewritten information upon it. One is the application proper, and second is a notation as to what has resulted by way of the application. The application itself is an application of the Consul General of Japan to receive a remittance in the sum of \$39,000 from the Imperial Government of Japan into the blocked account of Yoshio Muto with the Yokohama Specie Bank, Ltd., San Francisco, in order to make the ship's disbursements such as bunker and lubricating oil, provisions, and running stores, port charges, passenger expenses and passage money, and so forth, for the Japanese Government requisitioned ship *Tatuta Maru* in the port [214] of San Francisco due on or about October 30, 1941.

That I will stipulate is part of the application. On the same instrument there is the following notation which has nothing to do with the application. We have a copy of it and for the record I am reading it. It is really the result of the application and the receiving. The words:

"The above remittance has been made through the Yokohama Specie Bank, Ltd., Tokyo, Japan, to

(Testimony of Harold F. Wilson.)

the Yokohama Specie Bank, San Francisco, California, by telegraphic transfer.”

I am just being technical, under this particular portion, these extra lines I just read, were not on the original application as filed.

Mr. Saroyan: The Government would have brought that to our attention, Your Honor, if it was not.

The Court: We are concerned with the ultimate fact. Aside from that, what value is it?

Mr. Glicksberg: That is right.

The Court: All right. It will be admitted and marked.

Mr. de Lorimier: Introduce the authenticated copy, Your Honor.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 22 admitted.

(Whereupon the application for license, as indicated above, marked Plaintiff's Exhibit No. 22, was received in evidence.) [215]

The Witness: I have a copy of the license issued by the Treasury Department to the Consul General of Japan at San Francisco, 22 Battery Street, San Francisco, with a copy to Yokohama Specie Bank, Ltd., San Francisco, California, copy to Chief National Bank Examiner, San Francisco, California, license number S.F. 11630, dated October 29, 1941, which pertains to the receipt of \$39,000.

Mr. Saroyan: No objection, so long as the plaintiff is going—we might as well have all the facts.

(Testimony of Harold F. Wilson.)

The Clerk: Plaintiff's Exhibit 23.

(Whereupon a copy of the license No. S.F. 11630, dated October 29, 1941, referred to above, marked plaintiff's Exhibit No. 23, was received in evidence.)

The Witness: I have now a deposit ticket taken from the Yokohama Specie Bank wherein \$39,000 is shown as having been deposited to Consul General Yoshio Muto special account, October 29, 1941, with the notation:

"Tokyo T. T. P., \$39,000, new account."

The Court: The date of that?

The Witness: October —

Mr. Glicksberg: 29th, 1941. Well, introduce this deposit slip, Your Honor, please, as a next exhibit in order. Now, before I proceed with the next question——

Q. At the time this new account was opened up, what other accounts were in existence in the name of Yoshio Muto with the [216] Bank of, Yokohama Specie Bank, San Francisco Branch?

A. Mr. Glicksberg, I am unable to answer that with any degree of accuracy at this moment, because this account was opened on October 29, 1941. I have the ledger sheets here as of the close of business December 7, 1941, showing several other accounts to Consul General of Japan. Whether they were opened prior to October 29, 1941, without referring to my records I am unable to answer that question accurately. However, other accounts——

(Testimony of Harold F. Wilson.)

Mr. Glicksberg: You can determine and you can provide this Court with that information as to what other accounts Yoshio Muto had with this particular branch which were in existence prior to October 29, 1941?

A. Yes, sir.

Q. In the records you have with you at the present time, you cannot testify at the present time?

A. Not accurately, no, sir. I do not believe that these other accounts that I do have here were in existence on that date, but I couldn't testify accurately.

The Court: No dates on them?

The Witness: Yes, sir, but the dates are in December, 1941.

Mr. Glicksberg: Q. In other words, you have only carried out the last sheet of the account?

A. Yes, sir. [217]

Mr. Glicksberg: Well, Mr. Saroyan, subject to any correction which we will take——

Mr. Saroyan: One moment, off the record, ask Mr. Wilson a couple of questions, Your Honor.

Mr. Glicksberg: Off the record?

Mr. Saroyan: Off the record. Do you have further sheets, ledger sheets that precede those sheets at the office?

The Witness: Yes.

Mr. Saroyan: Were they in the banking department?

The Witness: I believe banking department.

Mr. Saroyan: Bring them in tomorrow morning.

Mr. Glicksberg: Sure.

(Testimony of Harold F. Wilson.)

The Clerk: Plaintiff's Exhibit No. 24 admitted and filed in evidence.

(Whereupon the deposit slip, dated October 29, 1941, marked plaintiff's Exhibit No. 24, was received in evidence.)

Mr. Glicksberg: Q. Have you any—I should have handed you this before.

A. Before I hand you the deposit ticket, Mr. Glicksberg, this is a copy of a cable received by the San Francisco office of the Yokohama Specie Bank, Ltd., from its Tokyo office, dated October 21, 1941, reading:

“L C, October 21, TT No. 1, A. & P., Muto Yoshio Japanese Consulate U.S. \$39,000. Official money order”——

I am spelling this—“G-a-i-m-u-s-h-o.” [218]

Mr. Glicksberg: You want to introduce——

Mr. Saroyan: You can introduce the original with the understanding it will be withdrawn and a copy substituted.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 25 admitted and filed in evidence.

(Whereupon the copy of the telegram above referred to, marked plaintiff's Exhibit No. 25, was received in evidence.)

The Witness: I have a signature card, title of account:

“Consul General Yoshio Muto Special Account”

(Testimony of Harold F. Wilson.)

with a Japanese rubber stamp character which reads:

“Authorized signature Y. Muto will sign:” And his signature thereon: “Yoshio Muto” in handwriting. Another signature, another authorized signature, “K. Inagaki” will sign here: and then there is a signature, I will spell this: “K-a-z-u-y-o-s-h-i” and the last name, “I-n-a-g-a-k-i”; there is type-written at the bottom of this card, “October 29, 1941, initial deposit \$39,000, special license No. S.F. 11630.”

The Court: Need not apologize for spelling those names out. Mr. Glicksberg is the one that can do that.

Mr. Glicksberg: We all know Yoshio Muto, I can't read Kazuyoshi Inagaki.

The Clerk: Plaintiff's Exhibit 26 admitted and filed in evidence.

(Whereupon the signature card above referred to, marked [219] plaintiff's Exhibit No. 26, was received in evidence.)

The Witness: I have Treasury Department Form TFEL-1 directed to the Secretary of the Treasury, reading:

“The name and address of the licensee is: The Yokohama Specie Bank, Ltd.

“B. The date of issuance and serial number of the license is October 29, 1941, serial number S.F. 11631.

(Testimony of Harold F. Wilson.)

“C. The transactions covered by such license were consummated as follows:”

And then it is typewritten in, it reads:

“Telegraphic transfer from the Yokohama Specie Bank, Ltd., Tokyo, Japan, on October 21, 1941, to pay Yoshio Muto, Japanese Consulate, the sum of \$39,000 completed by depositing said sum to credit of special blocked account in the Yokohama Specie Bank, Ltd., San Francisco, in the name of Consul General Yoshio Muto.”

That is signed the Yokohama Specie Bank, Ltd. The signature I am not able to decipher. There is a Notary Public—I should say there is a copy of a Notary Public’s seal. The same signature apparently was certified to on the 4th day of November, 1941, by Lillian Ralston, Notary Public in and for the city and county of San Francisco, State of California.

Mr. Glicksberg: Q. This instrument which you gave me is, purports to be a report which the holder of a license has [220] to make to the Treasury Department? A. That is right.

The Court: Going to inquire about the license. Did I follow you when you said this was a license?

Mr. Glicksberg: No, this is a report made by the licensee of a transaction which has been completed.

The Court: All right.

Mr. Saroyan: Your Honor, please, does the Clerk of the Federal Court have means whereby this could be photostated and the original returned to us? We don’t have any copies.

The Court: Well, if you will enter into a stipula-

(Testimony of Harold F. Wilson.)

tion to safeguard the witness on the stand, he is responsible for having the document.

Mr. Saroyan: You haven't made copies of this, have you, Mr. Wilson?

The Witness: I am sorry, I thought you had copies of everything.

Mr. Saroyan: No, not TFEL-1.

The Witness: I think you have one of that, sir.

The Court: Well, he is a little bit busy now.

Mr. Glicksberg: Introduce that report as the next——

The Court: He has a copy.

Mr. Saroyan: I think you are right. The only thing, this is the originally executed copy and the only one we have. Well, offer one in evidence. I can't give you one, Mr. Glicksberg. [221]

The Clerk: Plaintiff's Exhibit 27 admitted and filed in evidence.

The Court: So ordered.

(Whereupon the report above referred to entitled "Report to be filed by persons issued licenses on Form TFEL-1," marked plaintiff's Exhibit No. 27, was received in evidence.)

Mr. Glicksberg: Q. Have you any other records pertaining, bank records pertaining to this particular account?

A. Yes, sir. I have a copy of a license dated October 29, 1941. I believe the number to be 1174. It is obliterated by the rubber stamp of Yokohama Specie Bank, with the date October 29, 1941. It is

(Testimony of Harold F. Wilson.)

issued to the Consulate General of Japan at San Francisco, 22 Battery Street, San Francisco, California, with a copy to Yokohama Specie Bank, Ltd., San Francisco, California, and the chief National Bank examiner, San Francisco, California, which reads:

“Pursuant to your application of October 24, 1941, the following transaction is hereby licensed.”

Do you wish me——

The Court: Hereby what?

Mr. Saroyan: Hereby licensed.

The Court: What does that mean?

The Witness: The transaction which is to follow is licensed. [222]

The Court: I see.

Mr. Glicksberg: Authorized the Treasury Department, had to accept the license.

The Court: Have their own peculiar lingo in those things and I am not a bank man.

Mr. Saroyan: Under executive orders, freezing order.

The Witness: You wish me to read this?

Mr. Glicksberg: Yes, you can read it.

Mr. Saroyan: May I interrupt the Court? I intend to read each one of these applications and licenses into the record and am just wondering if this is the proper time, if it is done piecemeal, allow him to go ahead, whatever is the best way to introduce them in evidence, and after Mr. Glicksberg rests I would like to take them up chronologically. Not take very much time.

(Testimony of Harold F. Wilson.)

The Court: What have you to say to that?

Mr. Glicksberg: We are introducing them. If you want to refer to them, you want all the facts before the Court.

Mr. Saroyan: Well, my only——

Mr. Glicksberg: Any reference that counsel would make to them can be in an argument form.

The Court: He has all his subject matter indexed and properly prepared.

Mr. Glicksberg: Just like Mr. Glicksberg, read right down the line. [223]

Mr. Saroyan: Stealing your thunder.

The Court: Proceed, gentlemen.

Mr. Glicksberg: Let's introduce them——

Mr. Saroyan: Introduce them.

Mr. Glicksberg: ——the document as the next exhibit in order.

The Clerk: Plaintiff's Exhibit 28 admitted and filed in evidence.

(Whereupon the photostatic copy of license dated October 29, 1941, marked plaintiff's Exhibit No. 28, was received in evidence.)

Mr. Glicksberg: Suffice at the present time to state to the Court as I read this copy of a license it is a license to the Consular General of Japan to receive approximately \$68,000 resulting from the operations of the Tatuta Maru, gives the passenger fares, Mr. Saroyan will read it word by word.

Mr. Saroyan: Mr. Glicksberg, we definitely object at this stage so that we will be going in chrono-

(Testimony of Harold F. Wilson.)

logically, going to introduce the application for the license?

Mr. Glicksberg: No, no, no.

Mr. Saroyan: Application, is that the last license, Your Honor, license Number——

Mr. Glicksberg: 28.

Mr. Saroyan: Plaintiff's Exhibit 28, application No. 11631? [224]

Mr. Glicksberg: Next exhibit in order—make it 29.

The Clerk: Plaintiff's Exhibit 29.

Mr. Glicksberg: Make it a plaintiff's exhibit.

The Witness: At this point, Mr. Glicksberg, may I explain that I have handed you copies of licenses, two, both of which cover the deposit of moneys into the account of Consular General Yoshio Muto special account. I now have six copies of licenses, each with a different number and different dates. These licenses have to do with the disbursement of funds. Do you wish me to read each one of those, sir?

Mr. Glicksberg: Q. The documents which you have produced have to do with the initial deposit of thirty-nine thousand and the subsequent deposits from passenger fares with authority being given to Yoshio Muto, Consul General of Japan, to receive such items, is that correct?

A. In connection with the instructions from the Federal Reserve.

Q. That is right. Now, checking your ledger account with this bank book which the plaintiff has introduced as plaintiff's Exhibit No. 1, will you state to

(Testimony of Harold F. Wilson.)

the Court whether there is any disagreement at all as to the deposits other than the first deposit of \$39,000 which does not appear in the bank book?

A. There is no difference, sir.

The Court: He is looking for that first deposit.

The Witness: I know, this is the second deposit, Your Honor. [225]

The Court: First deposit.

The Witness: I have handed that to Mr. Glicksberg and that has gone in. I have the deposit tickets for the other deposits with me, sir, if you want them.

Mr. Glicksberg: Q. No.

The Witness: This pass book agrees with the ledger sheet of the Yokohama Specie Bank, Ltd., with the exception the first deposit is not entered into the book.

The Court: First deposit was not.

The Witness: \$39,000.

Mr. Glicksberg: Q. And according to your records, what balance is on account with the account of Yoshio Muto, Consul General of Japan, special account, as of December 7, 1941?

A. \$66,892.65. I would like to say the account on the books of Yokohama Specie Bank reads: "Consul General Yoshio Muto special account."

Q. Yes. This thing reads where I read it first, "Yoshio Muto, Consul General"?

A. Okay.

Q. Is that balance still as of the present date on the books of the company? A. Yes, sir.

(Testimony of Harold F. Wilson.)

Q. "Company" I mean, the Yokohama Specie Bank? A. That's right.

Mr. Glicksberg: No further questions. [226]

Mr. Saroyan: No further questions now, Your Honor. I will call him later.

The Court: Have you got all your documents?

The Clerk: I don't think I have.

The Court: You want to check that. Loose a lot of documents around here, check with the Clerk.

Mr. Glicksberg: Subject to the witness supplying information—one question.

The Witness: Yes, sir.

Mr. Glicksberg: Q. To wit, as to whether the number of accounts that were standing in Yoshio Muto's name.

The Court: He said he would be here.

Mr. Glicksberg: Yes, sir.

Mr. Saroyan: We want to offer in evidence, Your Honor, all the deposit slips. There are quite a number of them and I want to go over the disbursements showing disbursements were made by Yoshio Muto, and that is about it.

Mr. Glicksberg: Q. Have you the disbursements there? The ledger account, which was introduced as plaintiff's Exhibit No. 21, which were the disbursements that were made from the particular account?

A. I am obliged to answer that, Mr. Glicksberg, that the ledger sheet recites the debits to the account.

The Court: He is not prepared because he is not familiar with the ledger sheets or the books——

(Testimony of Harold F. Wilson.)

the Court whether there is any disagreement at all as to the deposits other than the first deposit of \$39,000 which does not appear in the bank book?

A. There is no difference, sir.

The Court: He is looking for that first deposit.

The Witness: I know, this is the second deposit, Your Honor. [225]

The Court: First deposit.

The Witness: I have handed that to Mr. Glicksberg and that has gone in. I have the deposit tickets for the other deposits with me, sir, if you want them.

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The Witness: This pass book agrees with the ledger sheet of the Yokohama Specie Bank, Ltd., with the exception the first deposit is not entered into the book.

The Court: First deposit was not.

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Mr. Glicksberg: Q. And according to your records, what balance is on account with the account of Yoshio Muto, Consul General of Japan, special account, as of December 7, 1941?

A. \$66,892.65. I would like to say the account on the books of Yokohama Specie Bank reads: "Consul General Yoshio Muto special account."

Q. Yes. This thing reads where I read it first, "Yoshio Muto, Consul General"?

A. Okay.

Q. Is that balance still as of the present date on the books of the company? A. Yes, sir.

(Testimony of Harold F. Wilson.)

Q. "Company" I mean, the Yokohama Specie Bank? A. That's right.

Mr. Glicksberg: No further questions. [226]

Mr. Saroyan: No further questions now, Your Honor. I will call him later.

The Court: Have you got all your documents?

The Clerk: I don't think I have.

The Court: You want to check that. Loose a lot of documents around here, check with the Clerk.

Mr. Glicksberg: Subject to the witness supplying information—one question.

The Witness: Yes, sir.

Mr. Glicksberg: Q. To wit, as to whether the number of accounts that were standing in Yoshio Muto's name.

The Court: He said he would be here.

Mr. Glicksberg: Yes, sir.

Mr. Saroyan: We want to offer in evidence, Your Honor, all the deposit slips. There are quite a number of them and I want to go over the disbursements showing disbursements were made by Yoshio Muto, and that is about it.

Mr. Glicksberg: Q. Have you the disbursements there? The ledger account, which was introduced as plaintiff's Exhibit No. 21, which were the disbursements that were made from the particular account?

A. I am obliged to answer that, Mr. Glicksberg, that the ledger sheet recites the debits to the account.

The Court: He is not prepared because he is not familiar with the ledger sheets or the books——

(Testimony of Harold F. Wilson.)

The Witness: I am quite familiar with the books.

The Court: What books did you have reference to that you weren't prepared to testify on?

Mr. Saroyan: The other Yoshio Muto accounts that have nothing to do with this account.

The Court: All right.

Mr. Glicksberg: Q. You can answer that question, if you can.

A. All I can say is that this ledger sheet taken from the books and records of Yokohama Specie Bank show the number of debits to the account of Consul General Yoshio Muto general account between November 1, 1941 and November 29, 1941. I am not able to say from this record who the moneys were paid to from this record.

Q. Now, Mr. Wilson, if you can, if you examine plaintiff's Exhibit No. 2, which is the cancelled stub book of Yokohama Specie Bank of Yoshio Muto account which was produced from the records of the NYK, in comparing those stubs with the ledger account I presume you will be able to testify as to whether those are actual disbursements and respective disbursements would appear the name of the payee and the person to whom the money went to?

A. Do you wish me to take the time?

Q. No, I don't, just like to have you——

The Court: Be working overtime, get time and a half. It [228] is nearly four o'clock now and since

(Testimony of Harold F. Wilson.)

he is to come back tomorrow he can get that information.

Mr. Saroyan: Any objection if the witness takes the book with him tonight? Stipulate between counsel——

The Court: What other books did he have reference to?

Mr. Glicksberg: No, just to refresh the memory, be able to testify as to how many accounts Yoshio Muto had, the period when that commenced, how long a period, the duration.

The Court: In any event, we can take care of those details so we can get through with him tomorrow.

Mr. Glicksberg: I hope that will be the plaintiff's case then.

The Court: If that is agreeable, we will take an adjournment. We have a calendar on tomorrow morning. If you come here at 10:30 I think we can get through with it.

Mr. Saroyan: 10:30?

The Court: 10:30 tomorrow.

(Whereupon an adjournment was taken until 10:30 a.m. tomorrow, Friday, April 13th, 1951.)

Friday, April 13, 1951—10:30 o'clock a.m.

The Clerk: Carr vs. Yokohama Specie Bank, further trial.

Mr. Glicksberg: Ready.

Mr. Saroyan: Ready.

The Clerk: Harold F. Wilson to the stand, heretofore sworn.

Mr. Saroyan: You want me to question Mr. Wilson?

HAROLD F. WILSON

a witness previously duly sworn on behalf of Plaintiff, resumed the stand and testified further as follows:

Direct Examination

Mr. Glicksberg: Q. Mr. Wilson, with reference to the questions which were propounded yesterday in respect to the other Japanese Yoshio Muto accounts in the bank of Yokohama Specie Bank, have you had an opportunity to examine the records of the bank? A. Yes, sir.

Q. And how many accounts have you found other than the one which is in question here standing in the name of Yoshio Muto?

A. I have four accounts in the name of Consul General of Japan and one account, Yoshio Muto, which was his personal account.

Q. All other four accounts were just captioned Consul General [230] of Japan?

A. One is Consul General of Japan.

Q. Have you a number on that account?

A. These were checking accounts, Mr. Glicksberg, they do not go by number.

Q. The banks don't have a number on their account at all?

A. Not on a checking account, sir. One is Consul General of Japan, one is Consul General of

(Testimony of Harold F. Wilson.)

Japan (A) account, one is Consul General of Japan (B) account, one is Consul General of Japan (C) account, and the other account Yoshio Muto, which was his personal account, is just Yoshio Muto.

Q. Now, the first account, have you a record when that account was opened up?

A. It was opened up on February 24, 1941.

Q. '41? A. Yes, sir.

Q. In the name of Consul General?

A. Of Japan.

Q. Of Japan. And the approved signatory to that account? A. Yoshio Muto.

Q. Yoshio Muto. Was there an initial deposit?

A. There was.

Q. Is it——

A. There was, but I have not got that, sir.

Q. Now, the second account, Consul General of Japan, when was [231] that opened up?

A. On the same date, February 24, 1941.

Q. Same signatories? A. Same signature.

Q. When was the Consulate General, that is what it is called?

A. Consulate? I am sorry, sir, you are correct.

Q. Consulate, C-o-n-s-u-l-a-t-e General of Japan as against our account as Yoshio Muto, Consul General of Japan, is that correct? A. Yes, sir.

Q. In other words, all of these accounts are captioned here on the ledger account Consul General of Japan, but on the opening title to the account, the account No. A is called Consulate, —a-t-e— General of Japan, is that right?

(Testimony of Harold F. Wilson.)

A. Yes, sir, there is a difference between the ledger sheet and the signature card. I had not noticed.

Q. Now, a third one is Consulate General of Japan, B account, which is opened February 24, 1941? A. Yes, sir.

Q. The fourth account, Consulate General of Japan, C account, was opened February 24, 1941?

A. Yes, sir.

Q. And the personal account of Yoshio Muto, Y-o-s-h-i-o M-u-t-o, opened up March 8, 1941?

A. Yes, sir. [232]

Q. His personal account shows on his card here an initial deposit of \$1,035.52. Now, at the time of closing of these accounts, December 7th, declaration of hostilities, all of these accounts were open accounts with the bank?

The Court: Were what?

Mr. Glicksberg: Were open accounts with the bank.

Q. Mr. Wilson, have you had an opportunity to check Plaintiff's Exhibit 2, which is the stub book of that account as against—setting forth upon the stubs certain itemizations of checks in respect of persons to whom they were given as against the ledger account of this particular account in person here, the Yoshio Muto Consul General Account, special account? A. I have.

Q. And were the expenditures, all the withdrawals as set forth in this Plaintiff's exhibit No. 2

(Testimony of Harold F. Wilson.)

exactly in accord with the withdrawals that appear on the bank's ledger?

A. No, they were not exactly in accord.

Q. In what respect do they differ, may I ask?

A. According to the stubs in this exhibit there were four checks issued that are not charges on the account in the bank. I would assume that there were four checks drawn payable to whoever they are stated to be payable to, which did not reach the bank at the time that it was turned over by the superintendent. Those are checks amounting to \$8.50, \$12.50, \$10.99, \$45.87. Other than that the check stubs and the ledger sheet in the bank are in accordance.

Q. In the respective amounts?

A. In the respective amounts.

Q. And the total of these four checks?

A. \$77.86.

Mr. Glicksberg: No further questions.

Cross Examination

Mr. Saroyan: Q. Just have one question at this time, Mr. Wilson. That is, did I understand from your testimony that three of the accounts are entitled "Consulate General of Japan, (A), (B) and (C)," the other one is—all opened on February 24, 1941—the other account is entitled "Consul General of Japan," opened on the same date, and the fifth account is entitled "Yoshio Muto" opened on March 8, 1941, is that correct?

A. Mr. Saroyan, I am obliged to explain that

(Testimony of Harold F. Wilson.)

when I first recited the names of the accounts in the bank I recited from the ledger sheets taken from the ledger of the bank, and I read Consul General of Japan as the title of each of the names. Mr. Glicksberg called to my attention the fact that the signature cards on three of those accounts read, "Consulate" as distinguished from "Consul". I believe they both are the same.

Mr. Saroyan: That is all at this time.

The Court: Step down.

(Witness excused.) [234]

Mr. Glicksberg: Plaintiff's case in chief—plaintiff's case.

Mr. Saroyan: Your Honor, at this time I would like to renew my motion to strike and bring to your Honor's attention some of the points I think we went over rather speedily. I won't take too much time. Move the Court to strike from the record that portion of the evidence offered by plaintiff that your Honor has admitted in evidence subject to plaintiff connecting the evidence with the issues of this case and subject to motion to strike on behalf of the defendants which evidence I will specifically set forth very briefly.

Mr. de Lorimier: If your Honor please, I join with Mr. Saroyan in the motion to strike.

Mr. Saroyan: The purpose of, possibly with this motion at this time, is not only for the purpose of keeping the record free from testimony as unreliable and unanswerable under the rules of evidence

in this court, but also for the purpose of keeping the record free and confined to the matters within the issues of this case without cluttering up the record with irrelevant and immaterial matters which have no place in the record here.

The objection to the testimony which I seek at this time to have stricken from the record here with the permission of the Court, reserved for the most part, fully stated and entered in the record at the time the evidence was offered— [235] I am sure the Court had the objections in mind, I won't labor the Court with the full objection to the evidence, but wish to set forth the testimony objected to with a brief summary of the objection.

The first portion can be grouped and treated as one category, and those are plaintiff's exhibits 3 through 14. I move to strike them from the records. Plaintiff's exhibits 3 to 14, your Honor will recall, were exhibits offered by plaintiff as records of NYK, San Francisco office. They contain such items as bearing lists of passengers, lists of passengers by names, destinations of passengers, cashiers' tags for sales of tickets, sailing date of the vessel, and so on.

We submit that there is no proper foundation laid for the introduction into evidence of these records. Mr. Glicksberg only stated that they were NYK records, no one else was produced to identify these records, there is no one subject to cross examination by the defendants. It is a very unusual case, one where, from the allegations contained in the complaint, smack of fraud, and as viewed, as plaintiff contends illegal and in violation of our Federal laws.

Under the circumstances I submit that a proper foundation should have been laid before these exhibits, 3 to 14, be allowed in evidence.

The objection we most strenuously urge to the Court is that these records, 3 to 14, have in no way been connected by [236] the plaintiff with the issues of the case. There is no relation between them and the money going into the bank account involved, and completely irrelevant, merely serve to clutter up the record.

It is to be noted that each has referred to the Japanese Government requisitioned ship. How can the plaintiff say NYK operated the ship and therefore argue the proceeds of the tickets sold belonged to NYK when on the face they show the Japanese Government operated the ship?

Secondly, we move to strike plaintiff's exhibits 15, 16 and 17, which were records of tickets sold by NYK as far back as March 28, 1941. These tickets were in no way connected by the plaintiff to the money in the bank and are irrelevant as far as the issues of this case are concerned, sold prior to the Japanese Government taking over this ship. The plaintiff's explanation for their relevancy is that is other exhibits connect them up, company records show that these tickets were honored later. Naturally they were honored as the Japanese Government was assuming the withdrawals of nationals from the United States.

Thirdly, we move to strike exhibits 18 and 19 as irrelevant and immaterial to the issues of this case. Your Honor will recall that the plaintiff offered ex-

hibits 18 and 19 to show that some of the fares were to be collected in Japan and some were paid in the United States. This is not relevant [237] and not connected with the money in the bank account. That portion showing money actually collected is irrelevant for the same reason.

We move further to strike interrogatories 18 to 23 and the answers thereto. These interrogatories, as your Honor will recall, at the time I moved for them to be stricken as calling for the opinion and conclusion of the witness. The records speak for themselves. The witness said that the records had not come into the possession of NYK in Tokyo until September, 1942, or approximately one year after the transaction took place. Therefore, under the rules we do not believe that they are proper business records obtained in the ordinary course of business while the transaction was being consummated.

Fifth, we move to strike Plaintiff's Exhibit 20. Your Honor will recall that these exhibits, A through H, the long exhibits Mr. Glicksberg read into the record, they were offered by the witness Seishi Hiroyoshi in answer to interrogatory 23. Due to the nature of the exhibits and the different circumstances of the exhibits, with the Court's permission I would like to restate my objection somewhat in detail.

Excuse me one minute, your Honor.

I don't know whether it is necessary for me to repeat at this time, your Honor, but if your Honor wishes I will make my objections to exhibits A

through H offered by the witness, and in brief there was not proper foundation laid, that they [238] were hearsay testimony, it called for the opinion and conclusion of the witness, and the witness answered by giving his opinion and conclusion and also by referring to conferences and statements made and decisions made by the Empire of Japan and decisions made by NYK, and so forth.

And we also call your Honor's attention to the fact that a considerable number of the exhibits that were offered into evidence pertain to Seattle, Honolulu, and I believe Los Angeles and New York passage. It has nothing to do with the issues of this matter as to who owns the bank account entitled "Yoshio Muto Consul General Account" in the Yokohama Specie Bank.

We move to strike interrogatories 26, 27 and 28, and the answers thereto. Your Honor will recall that the witness was asked whether the records of NYK disclosed whether they showed a final decision made by the Empire of Japan as to Muto's accounts, the Empire of Japan's and NYK's right to the bank account in question. The witness referred to Exhibits D and F of the deposition and we objected to the introduction of D and F on the grounds that it was, practically all was hearsay, without proper foundation and opinions and conclusions of the witness.

We move to strike interrogatory 31 to 35, and the answers thereto for the same reason that the witness had no factual knowledge of the matters which he would be interrogated, and the answers

that he gave were conclusions and [239] his opinions, and move to strike interrogatories 36 through 45 and the answers thereto. Your Honor will recall that they relate to the payment of fares in Tokyo after the outbreak of the war. Plaintiff admitted these were not part of the bank account involved and we submit they are irrelevant and immaterial and have nothing to do with the issues as to who owns this bank account, and merely clutter up the record.

And we move at this time to strike cross-interrogatories and answers 8 to 14 on the grounds that they are merely opinions and conclusions of the witness, no proper foundation laid for the questions and answers; the records should speak for themselves. We submit our motion to strike should be granted.

With your Honor's permission I would like to just go hastily over Exhibit D. As your Honor will recall that was dated November 26, 1943, or approximately two years and two months after the transaction took place. It was from the foreign office of the Japanese Government to the President of NYK and it attempted to set forth the disposition of funds allegedly supplied by NYK for transmission to the Consular accounts in this country. And it was an attempt of a settlement of accounts between the Government and NYK.

This document, we believe, is hearsay of the worst kind. It is not a proper entry or record concerning the transaction as it is a matter of some 26 months after the [240] transaction was involved and con-

summated. It was not a business entry of NYK, but a mere letter from the Japanese Government to NYK in response to an inquiry that NYK had made to the Government. It is self-serving and cannot under any theory under which the attempt is made for foundation be allowed in evidence. It is not a business entry or a part of the business entry record.

Then exhibit E we submit is also hearsay of the worst order. As your Honor will recall that was a document dated December, 1942, a lengthy document, I think that was the lengthiest document that the plaintiff has introduced. It was compiled by the Bureau of Political Affairs approximately fourteen months after the so-called transaction occurred, a political bureau, the Political Affairs Ministry of the Imperial Japanese Government. This is the exhibit, your Honor, that sets forth the communications between the American State Department and the Japanese Government cabinet regarding the execution of plans to send the ships to America. What counsel is doing here, the plaintiff, he is coming into court and trying to get this court to confirm a plan or a conspiracy or an arrangement which the State Department and this Government disallowed.

We object to the introduction of this exhibit on the grounds that it is hearsay and self-serving, it is not a proper business entry, in fact, merely a letter from a third party. And further, it relates to extraneous matters [241] regarding Canadian Consul and other Consuls, has nothing to do with the question as to who owns this bank account.

Exhibit F—most of the same remarks in respect to Exhibit E are applicable to F. It should be pointed out that letter was a letter dated September 6, 1948, and a letter attached thereto, which is a part of the same exhibit, was dated August 20, 1948, or approximately six years after this transaction occurred and is simply another letter from the foreign ministry of the Japanese Government to the President of NYK regarding the compensation for operation of repatriation vessels.

Every bit of testimony that has gone in so far has shown that this was a Japanese requisitioned vessel, the vessel was being operated by the Japanese Government, then the transaction, the worst that could **possibly** have happened is that NYK might have been acting in an agency capacity for the Japanese Government, and that we will show when we put on our evidence.

I believe our motion to strike should be submitted at this time and your Honor should grant the same.

Mr. Glicksberg: I don't know, your Honor please, whether your Honor desires to have me answer at length, but for the record I want to clarify our position, and I say "Our position", the position of the Trustee in Bankruptcy, and at the same time clarify the record. At the present time the [242] status of the record, we have one suit by the plaintiff which is a complaint for quiet title to various sums of money standing in the account of Yoshio Muto. Then, we have another complaint by the Alien Property Custodian, or by the United States Government, which is an affirmative complaint in interven-

tion. Ordinarily, in the procedure, I take it, the plaintiff's case would go in, a motion for a non-suit, perhaps, would lie, by certain defendants, if it was urged, could be urged, and then would come, before that determination could be had the plaintiff in intervention would have to come in and present his case, to which case Sterling Carr, as the defendant in the complaint in intervention, would have the right to present testimony affecting the complaint in intervention and testimony to support the cross-complaint of Sterling Carr to the complaint in intervention.

That is the status of the record in so far as pleadings are concerned. I assume we can have a stipulation that all of the testimony which has been adduced by the plaintiff herein is likewise adduced in support of its cross-complaint and in support to the defense—the answer to the complaint in intervention of the United States Government, as I am taking the position at this particular moment, since Mr. de Lorimer on behalf of the United States Government, joining with Mr. Saroyan on a motion to strike, that we are in the [243] position where this testimony can be considered as having been introduced, perhaps out of order. That brings me then to a discussion of counsel's motion which now has to be discussed in the light of two respective parties; one, the Yokohama Specie Bank, the other the complainant in intervention, or the plaintiff, the United States Government.

The position of Sterling Carr, on behalf of the creditors of NYK, American creditors, solely has

always been that we have a fund in the jurisdiction of this court to which bankruptcy jurisdiction has attached itself, and that this fund of \$66,000 odd legally are the funds of the NYK irrespective of in whose name the funds stand outwardly in the account of the bank.

I support of that theory legally, Mr. Carr, as such trustee on behalf of the creditors, proceeds on the theory of a resulting trust. Not a resulting trust where the consideration or the proceeds can be followed where one individual gives the certain funds or proceeds to another and where there is an obligation imposed upon the other to return such funds. No matter in whose name it is then kept, the Courts then decree a resulting trust. A resulting trust falls not only in real property, but in personal property.

Now, for the evidence which is necessary to support a resulting trust, the authorities are clear that the whole course of conduct between the two people who are in interest, [244] who have entered into this arrangement which gives rise to a resulting trust can be placed before the Court. Circumstances, positive circumstances, negative circumstances, admissions against interest of the respective parties, all have a place before the Court when the Court determines the rights to two people claiming a fund in possession of a third person. Now, when counsel urges all of the objections which he has urged before your Honor at the present time, they are really simmered down to two objections. One, presumably hearsay; secondly, that the records not in the course

of business; and thirdly they were made at different times.

In so far as the position of the Yokohama Specie Bank as a defendant is concerned, since they have no actual interest in this litigation, any hearsay testimony of an arrangement between the two parties to this transaction, which ultimately gives rise to a resulting trust, may or may not be hearsay, but it is not being introduced as against the holder of the fund, it is only being introduced as against the other claimant of the fund which stands in the name of the bank.

When we—when counsel urges hearsay, then I submit in so far as the defendant Sterling Carr to the complaint in intervention is concerned, there is no hearsay there because it is an arrangement between NYK and the Empire of Japan, an accorded set-up between themselves and an agreement made between themselves as to who has title to those particular funds. [245] How one can urge hearsay when the particular person has entered into the agreement and when we have produced the agreement is beyond my comprehension.

In so far as its relevancy, its relevancy is not only material as against the Alien Property Custodian, but it is conclusive, and it is binding upon him because he only can stand in the shoes of the Empire of Japan. Mr. Saroyan and the Yokohama Specie Bank admit by their complaint that they owe this money. They say they only owe it presumably to Yoshio Muto, the Consul General of Japan. We turn around and we state we propose to prove and offer

to prove by a series of transactions, by a series of letters and by a series of communications between the Empire of Japan and NYK, that even though these funds stand in the name of Yoshio Muto, who is Consul of Japan for and on behalf of the Empire of Japan, that in truth and in fact the Empire of Japan has conceded and has notified in writing the NYK that these funds are actually the funds and belong to the NYK. As such every objection of hearsay falls by the wayside because it is an actual arrangement between the parties and can be introduced any time as against the United States Government standing in the shoes of the Empire of Japan.

In so far as the objection about the period of time that has elapsed, I have to disagree with worthy counsel. I think he is absolutely in error. I think he falls into a [246] state of confusion because he thinks an entry being made in the course of business must be presumably made on or about the time when the transaction is imminent. Such, I think, is purely elementary; it isn't the law. In other words, if I and someone else entered into a transaction, an executory contract today, and perhaps that contract is performed, and not performed, and then five years from now we then agree to settle accounts between ourselves, arrangements as to that particular transaction, if we ever have a dispute, and we ever go to court, all of those records, no matter when they are made, or any series of communications or any letter which I have forwarded to the other person or the other person has forwarded to me is at all times ad-

mitted as against admission against interest of mine or the other person.

Now, in so far as the admissibility of records in the course of business, the Act, the uniform business act, and Rule 43 does not state that there must be a basis laid within the period of time or close to the period of time when the transaction was had. All the Act requires, all the business, uniform business law requires is that the records that are proper to be introduced have come into the possession of either person in the ordinary course of business irrespective of when they have been given to them, as long as they are ordinary business records. And 43 goes on further, and I am reading: [247]

“All other circumstances of the making of such writing or record, including the lack of personal knowledge by the entity or the maker, may be shown to affect its weight, but that does not affect its admissibility.”

In other words, when Mr. Hiroyoshi comes in here before this Court and if he were sitting on this particular stand he would only tell this Court, “I have found these things in the records of NYK and as such Custodian I am here presenting them.” They then come before your Honor and then the records speak for themselves. From those records the Court can determine the actual transaction between the respective parties before this Court.

How we can urge lack of knowledge of Mr. Hiroyoshi or lack of knowledge on the part of anyone, I can't understand. I think that is where counsel falls into his error of his ways.

Now, a great deal has been said during the course of this trial about the period of time which has elapsed. Of course your Honor has to take into consideration that up until 1945, from December 7th, there was no communication with Japan, there was no formal method of corresponding, and up 'till 1945 the course of conduct which these exhibits show, evidenced to this Court, show that even as the early part of 1942, shows within two or three months after declaration of war the NYK in Japan was making contact with the Empire of Japan in Tokyo, attempting to secure from the Empire of Japan an expression as to the expenses of these vessels which were [248] requisitioned, and also an indication of the ownership of the funds in outside areas of Japan. When we introduced these exhibits, and when they came into the possession of the NYK are entirely immaterial, but they do show that as early as 1942, '43, '45, '48, the NYK in Tokyo was still pressing the Empire of Japan actually for a solution to the outside funds which were standing not only in the United States, but there are funds standing in seven countries and other places, South America, other countries.

Therefore, when we come before your Honor, we are coming now in 1950 because up until 1947 no one could even go to Japan to even secure any evidence of any transaction between the NYK and the Empire of Japan. It is only now that we are able to show to your Honor the actual conduct of the Em-

pire of Japan and the NYK with reference to these particular vessels.

Now, definitely the vessel that went to Seattle, or the reference to the vessel that stopped at Honolulu is entirely, perhaps, immaterial to this particular case, but they are part of the documents, and they go on to show one course of conduct as between the particular Empire of Japan and NYK, and they go to show that it is not one isolated experience or in one isolated instance, wherein Sterling Carr, as the Trustee, just comes in here and says, "Look, we want this \$66,000 for the benefit of American creditors," but there are other funds and [249] all of these funds, if they could be reached, should go for the benefit of the American creditors here in the United States.

Now, the Alien Property Custodian makes no comment about that. The Alien Property Custodian makes no statement, but just states to this Court, "Now, look, we will be satisfied to have a determination made by this particular court. We are only seeking to have the rights to this particular fund determined." And in this instance I repeat your Honor will ultimately have to make two decisions; one, on the question of Sterling Carr, and the second on the complaint of intervention, the United States Government, and the answer and the cross complaint by Sterling Carr.

All of the testimony which went in here is admissible to show the course of the conduct of the respective parties. The tickets which I have introduced here, which were paid in Japan, go to nega-

tive any inference which can be drawn that the proceeds from this vessel were any part of Yoshio Muto's funds, or the Empire of Japan. Mr. Wilson, on the stand, the records which we have introduced to which they are objecting, shows an exact compilation and an admission between the parties that so much money was advanced, including the \$39,000. So much money was deposited in this particular Yoshio Muto account; so much money is left. That money, according to these series of correspondence between the Empire of Japan and NYK, the Empire of Japan concedes and states it is the property of the NYK. How counsel can object just because [250] in 1942 such a statement was made, in 1943 it was admitted again, and in 1945 was admitted again, and in 1948 was admitted again—it is only corroboration and reaffirmation of the position of the Empire of Japan and the NYK.

Both parties before your Honor—by both parties I am forgetting Yokohama Specie Bank, because they are solely custodian, the United States Government and Sterling Carr both are standing here as officers of the Government and the Court, both have only requested an interpretation by this Court as to who, to whom those funds belong, and we submit that every document which we have which has been introduced here is admissible, not only as to the course of conduct, but as—admissible as a business record which was received by the NYK in proper time and as an admission against interest against the Alien Property Custodian. We submit that the motion should be denied.

Mr. Saroyan: Your Honor please, the several statements Mr. Glicksberg has made from which he wishes to have the Court draw the inference that he, representing the trustee in Bankruptcy of NYK, should come into this court and that the Government and the State Banking Commissioner did not assert any defense as to who owns this money. He says we are a stake-holder. We aren't a stake-holder. Section 136, if the Superintendent of Banks doubts the justification or validity of any claim he may reject the same and serve notice [251] of such rejection against the claimant and go into Court and litigate. The office of the Alien Property Custodian, by Supervisory Order No. 39, served on the Superintendent of Banks on October 3, 1942, and I don't think counsel doubts—you stipulate that was served on the Superintendent of Banks I believe you will admit that.

Mr. Glicksberg: Counsel, I will be—are we in again? I don't have all the vesting orders admitted in evidence, and they will, I trust.

Mr. de Lorimier: Admit it right now.

Mr. Saroyan: One minute. By virtue of supervisory order, the Alien Property Custodian, the United States Government, has directed the Superintendent to litigate this matter and assert any possible legal defenses it has as to the ownership of this account. That is why we find ourselves in this court today.

Counsel possibly would lead the court to believe that well, if he doesn't get his money from this account he doesn't get it from any place. That is not

true. Counsel has his relief under the Executive Orders. If there was an arrangement made between the Japanese Government and NYK for the operation of that ship by virtue of a contract, a requisition contract, then there may be an accounting, and that is what counsel has brought in evidence. It is an accounting between the two which has nothing to do with the money on deposit and if today [252] the Government owes NYK any money counsel's relief comes by the filing of a claim, which he has already done with the Attorney General of the United States, where the Attorney General has a fund that belongs to the Japanese Government and uses that fund for the purpose of paying off American creditors.

Counsel has admitted to me on several occasions that he has it on file. And he wants to go after this fund where he knows there won't be any possibility of only receiving the dividend, he wants the whole thing, wants to make a trust out of it. Secondly, your Honor, I wish to call the Court's attention to U.S. vs. United Shoe Machine Corporation, an Anti-trust suit. In this case our objection goes to the records themselves. Counsel thinks we are objecting to hearsay, it goes to the records themselves.

On page 355 in this case, referring to business records, the court said: "The documents are not admissible under 28 U.S.C.A., Section 1732," in 1732 is Rule 26-D of this Court which I have presented to the Court's attention on several occasions during the trial of this matter.

"* * * for all the opinions expressed by the em-

ployees.” The documents are not admissible. “Some courts have regarded the statutory phrase, ‘Record of any act, transaction, occurrence, or event,’ as justifying a court in receiving some opinion evidence as, for example, a Coroner’s certificate that death was caused by ‘accident—eating canned meat’ * * * or a hospital record showing a doctor’s diagnosis of cerebral hemorrhage, * * * or other medical opinion reported in hospital or official records. Even these cases do not go so far as to permit the introduction in evidence of written opinions about facts of which the entrant and those with whom he is associated in business have no personal knowledge. The advocates of a broad construction of 28 U.S.C.A., Section 1732, would not favor admission of such evidence.”

Counsel’s—all of counsel’s evidence would be out under that rule.

The New York Life Insurance Company vs. Taylor, 147 Fed. 2nd, 297, the Court said:

“Today every great corporation is making thousands of records, obtaining credit information, making psychological examinations of its employees, hiring efficiency experts and recording the activities of its personnel. To admit this potpourri on the sole tests of regular recording and absence of motive to misrepresent would be drastic impairment of the right of cross examination.”

If Mr. Hiroyoshi had come in here he would not be able to testify to one-tenth of the questions he has answered in those interrogatories.

Counsel referred to letters in '41, letters in 1942,

'43, and all confirming. That is not true. Those items that he [254] wishes to bring into this record by the interrogatories, those exhibits were compilations, an accounting between the Japanese Government and the NYK to show as to what balance NYK might owe to the Japanese Government, or vice versa, as a result of an agreement that they had, and there was no other way to handle it, because the State Department of the United States wouldn't permit it and we have an application here that was filed by NYK just a few days before this transaction occurred here where NYK sought permission to run these boats and the Government said "No." And now they come into this court and by means of a subterfuge they want to show NYK's operations, any moneys that were on deposit at the bank belonged to NYK, and that it was a secret trust.

We respectfully submit that our motion should be granted.

Mr. Glicksberg: I don't know whether I should reply to the argument of counsel, but I don't want your Honor to get the impression that we have our remedy before the Alien Property Custodian under a claim. We have filed a claim there, but that is, that was because we were afraid that this case would not be able to go to trial. An adjudication by the Court would have the effect of being *res judicata* against any claim with the Alien Property Custodian, because the United States Government and the Alien Property Custodian are before this Court with a Trustee at the present time.

The Court: Motion will be submitted. Proceed with the [255] evidence.

Mr. Saroyan: Your Honor please, at this time the defendant wishes to offer in evidence supervisory order No. 39.

Here is another one you can look at, Mr. Glicksberg. Offer in evidence at this time, your Honor, a document entitled "Office of Alien Property Custodian, Washington, supervisory Order No. 39, re: Yokohama Specie Bank, Ltd. (San Francisco)," and ask that it be admitted in evidence as defendant's exhibit.

Mr. Glicksberg: No objection.

Mr. Saroyan: I would like to read a portion of this into the record.

The Court: So marked.

The Clerk: Defendant's Exhibit A admitted and filed in evidence.

(Whereupon the document entitled "Supervisory Order No. 39" marked Defendant's Exhibit A, was received in evidence.)

Mr. Saroyan: Reading to your Honor:

"Under the authority of the Trading with the Enemy Act as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

"(A) That Yokohama Specie Bank, Ltd., a Japanese Corporation, Tokyo, Japan, which has an established branch office at San Francisco, California, engaged [256] in the conduct of business within the United States, is a business enterprise within the

United States which is a national of a designated enemy country (Japan); and

“(B) That there is property which is payable or deliverable to, or claimed by, the aforesaid Yokohama Specie Bank, Ltd., or its said San Francisco Branch which is in the process of administration by a person (namely, the Superintendent of Banks of the State of California) acting under judicial supervision (namely, that of the Superior Court of the State of California, in and for the City and County of San Francisco, within the meaning of Section 2 (f) of the aforesaid Executive Order;

“And determining that to the extent that such national is a person not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of such designated enemy country (Japan), and having made all determinations and taken all action, after appropriate consultation and certification, required by said executive order or act or otherwise, and deeming it necessary in the national interest, hereby undertakes the supervision to the extent deemed necessary or advisable from time to time by the undersigned of such San Francisco branch of said business enterprise, and of all property of any nature [257] whatsoever owned or controlled by, payable or deliverable to, or held on behalf of, or on account of owing to said branch, without, however, vesting such business enterprise or any of its capital stock or any of its property or assets.

“The action herein taken shall not be deemed to limit the powers of the Alien Property Custodian to

vary the extent of such supervision or to terminate the same, or to indicate that compensation will not be paid, if and when it should be determined that the extent of such supervision should be changed, or that such supervision should be terminated or that compensation should be paid.

“Any person, except a national or a designated enemy country, asserting any claim arising as a result of this order (but not including any claim of any nature against Yokohama Specie Bank, Ltd., or its San Francisco branch, which any claimant is now or may hereafter be entitled to file with the Superintendent of Banks of the State of California) may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on form APC-6, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to the allowance of any [258] such claim.

“The terms ‘National,’ ‘designated enemy country,’ and ‘business enterprise within the United States,’ as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

“Executed at Washington, D. C., on October 3, 1942.

“(Official Seal.)

“Certified to be a true copy of the original, Francis A. Mahony.

(Signed) “Leo T. Crowley, Alien Property Custodian.”

Ask that be marked.

Your Honor wish to recess at this time for Mr. Karesh?

(Whereupon other matters were considered by the Court.)

The Court: Proceed, gentlemen.

Mr. Saroyan: Your Honor, at this time I wish to offer in evidence a letter from the office of Alien Property Custodian, Washington, dated October 3, 1942, addressed to the Superintendent of Banks, State Banking Department, San Francisco, California, in regard to Yokohama Specie Bank, Ltd., San Francisco office. This letter is the forwarding letter attached to the Supervisory Order at the time of service. It reads:

“Dear Sir:” —

Mr. Glicksberg: One moment. Just for the record it is entirely incompetent, irrelevant and immaterial and not binding on behalf of the plaintiff herein, either as a plaintiff [259] or as a cross-defendant.

The Court: I will give him a record. Proceed.

Mr. Saroyan: (Reading)

“Pursuant to Supervisory Order No. 39 issued by the undersigned under date of October 3, 1942, a copy of which is enclosed herewith, the undersigned has undertaken the supervision to the extent deemed necessary or advisable from time to time by the undersigned, of the business enterprise and property referred to in such order without, however, vesting

such business enterprises or any of its capital stock or property or assets.

“For the present, it is contemplated that you shall continue to retain possession of and liquidate such business enterprise, its property and assets, and in the course thereof you may do such acts and perform such duties as may be required of or permitted to you by and in accordance with and subject to the provisions of the laws of the State of California. You shall, however, within a reasonable time prior to the submission by you to the Court of each report requesting confirmation of your recommendations with respect to the payment of any claim or claims set forth in such report, in the event such reports are to be submitted, or if no reports are to be submitted, within a reasonable time prior to the service of notice to creditors holding such claims with regard to the allowance thereof, deliver to the undersigned or his duly authorized agent, a copy of such report, or of said notice to creditors, together with a statement setting forth the nature and amount of the claim or claims intended to be allowed, and the names, addresses, and, so far as known, the nationalities of the owners or holders thereof. The undersigned will then examine the same, and take whatever action he may deem necessary or advisable. In connection therewith you are requested to accord to the undersigned or his duly authorized representative access to and the right to inspect at any time your books and records dealing with the aforesaid company.

“You are also requested to notify the under-

signed when you have liquidated assets sufficient to produce funds necessary to pay, and there have been paid, all the accepted or established claims of creditors whose claims arose out of transactions had by them with the San Francisco branch of each business enterprise, or whose names appear as creditors on its books, together with interest thereon, and the expenses of liquidation, so that the undersigned may take such action at that time with respect to the assets remaining in your hands as he may deem necessary in the interest of the United States. [261]

“The undersigned reserves such rights as he may have under the authority vested in him by law to vary from time to time the extent of the supervision of the aforesaid business enterprise and property, or to terminate the same, provided that the extent of such supervision will be changed or terminated only by means of written notification transmitted to you by the undersigned or his duly authorized agent.

“Until receipt by you of such notice in writing you may proceed with the liquidation of the aforesaid company and its assets in the manner herein set forth.

“Very truly yours,

“Leo T. Crowley,

“Alien Property Custodian.”

The Court: Is that a copy?

Mr. Saroyan: Yes, this is a copy.

The Court: No objection?

Mr. Glicksberg: No, your Honor.

The Court: About a copy?

Mr. Glicksberg: Materiality, your Honor.

The Clerk: Defendant's Exhibit B admitted and filed in evidence.

(Whereupon the letter above referred to, dated Oct. 3, 1942, marked Defendant's Exhibit B, was received in evidence.)

Mr. Saroyan: Your Honor, at this time defendant [262] Superintendent of Banks wishes to offer in evidence Executive Order No. 8389, as amended, and it is about a page long. If your Honor is not impatient I would like to read it because your Honor asked some questions; I think after I read this they will be answered.

Mr. Glicksberg: Counsel, if you are offering something, first of all, I don't think we ought to have an argument.

Mr. Saroyan: All right.

Mr. Glicksberg: Making a speech when you are offering something, and if you want to argue the case——

The Court: The Jury is absent.

Mr. Glicksberg: I know, but your Honor is here and I would like to have a record.

Mr. Saroyan: "Executive Order No. 8389.

"Regulating Transactions in Foreign Exchange and Foreign-owned Property, providing for the reporting of all foreign-owned property and related matters."

One large annotated paragraph which I will not read.

Mr. Glicksberg: May be stipulated that all of it may be introduced as part of the record.

Mr. Saroyan: That is right, but I would like to read a portion of it, Mr. Glicksberg.

Mr. Glicksberg: Oh.

Mr. Saroyan: First part has the annotation.

“By virtue of and pursuant to the authority vested [263] in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415) as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this order is in the public interest and is necessary in the interest of national defense and security, I, Franklin D. Roosevelt, President of the United States of America, to prescribe the following.

“Executive Order No. 8389 of April 10, 1940, as amended is amended to read as follows:

“Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country, designed in this order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this order, or any national thereof, has at any time on or since the effective date of this order had any interest of any nature whatsoever, direct or indirect:

“A. All transfers of credit between any banking institutions within the United States; and all trans-

fers of credit between any banking institution within the United States, and any banking institution outside [264] the United States (including any principal) agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States:

“B. All payments by or to any banking institution within the United States;

“C. All transactions in foreign exchange by any person within the United States;

“D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

“E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

“F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

“Section 2.

“A. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise:

“(1) The acquisition, disposition or transfer of, or other dealing in, or with respect to, any security or evidence thereof on which there is stamped or imprinted, [265] or to which there is affixed or otherwise attached, a tax stamp or other stamp of a foreign country designated in this order or a no-

tarial or similar seal which by its content indicates that it was stamped, imprinted, affixed or attached within such foreign country, or where the attendant circumstances disclose or indicate that such stamp or seal may at any time have been stamped, imprinted, affixed or attached thereto; and

“(2) The acquisition by, or transfer to, any person within the United States of any interest in any security or evidence thereof if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States.

“B. The Secretary of the Treasury may investigate, regulate, or prohibit under such regulations, rulings, or instructions as he may prescribe, by means of licenses or otherwise, the sending, mailing, importing or otherwise bringing, directly or indirectly into the United States, from any foreign country, or any securities or evidences thereof, or the receiving or holding in the United States of any securities or evidences thereof so brought into the United States.

“Section 3. The term ‘Foreign country designated in this order’ means a foreign country included in the [266] following schedule, and the term ‘effective date of this order’ means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

“(a) April 8, 1940—Norway and Denmark;”
Your Honor please, I will not read the countries.

“The ‘effective date of this order’ with respect to

any foreign country not designated in this order shall be deemed to be June 14, 1941.

“China and Japan,” which by notation at the bottom of the page shows: “Subdivision (k) added by Executive Order No. 8832, dated July 26, 1941 (6 F. R. 3715). See Press Release No. 7.”

And two pages of the executive orders which I will not read, but the final short paragraph, section 8.

“Section 5 (b) of the Act of October 6, 1917, as amended, provides in part:

“ * * * Whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule, or regulation issued thereunder shall, upon conviction, be fined not more than \$10,000.00, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, [267] or both.’

“Section 9. This order and any regulations, rulings, licenses, or instruction issued hereunder may be amended, modified or revoked at any time.

“Franklin D. Roosevelt.

“The White House, June 14, 1941.”

I ask this be marked Defendant's Exhibit, Superintendent of Banks, next in order.

The Court: It may be marked.

The Clerk: Defendant's Exhibit C, admitted and filed in evidence.

(Whereupon Executive Order No. 8389, as amended, marked Defendant's Exhibit C, was received in evidence.)

The Court: I have a matter to take up in my chambers. We will take an adjournment until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.)

Afternoon Session, Friday, April 13, 1951—2:00 p.m.

Mr. Saroyan: Your Honor please, at this time the defendant wishes to offer into evidence a letter dated October 29, 1941 from the Federal Reserve Bank of San Francisco, addressed to Nippon Yusen Kaisya, (NYK Line) 500 California Street, San Francisco, to which there is attached an application for a license to engage in the foreign transaction, and application S. F. 11535, and attached to it is also a document with a heading, "Consulate General of Japan, 22 Battery Street, San Francisco, California," dated October 17, 1941. And the first page of these three documents is a certification by the Attorney General to the effect that the attached are photostatic copies of the original record found in the custody of the office of the Alien Property Custodian on the following:

"Form TFE-1, Application No. S. F. 11535, filed by Nippon Yusen Kaisya (NYK Line) San Francisco, California."

And, "A letter dated October 29, 1941, to Nippon Yusen Kaisya (NYK Line) 500 California Street, San Francisco, California, from the Federal Reserve Bank of San Francisco."

Like to have it marked at this time, with Your Honor's permission, and I would like to read a portion of it into [269] evidence.

The Court: Admitted and filed in evidence.

The Clerk: Defendant's Exhibit D, admitted and filed in evidence.

(Whereupon the documents above referred to, marked Defendant's Exhibit D, were received in evidence.)

Mr. Saroyan: Reading from Exhibit, Defendant's Exhibit D, a letter.

"Federal Reserve Bank of San Francisco

"October 29, 1941."

Over on the right side:

"S. F. 11535."

"Nippon Yusen Kaisya (NYK Line), [270]

"500 California Street,

"San Francisco, California.

"Re: Your application dated October 22, 1941 assigned application No. S. F. 11535.

Dear Sirs:

"Reference is made to the above mentioned application in which you requested authority to handle the Japanese Government requisitioned ship 'Ta-tuta Maru' in the Port of San Francisco, as authorized by power of attorney executed by Yoshio Muto, Consul General of Japan, at San Francisco,

a copy of which was attached to your application.

“No action is being taken with regard to your above-mentioned application inasmuch as the ‘Ta-tuta Maru’ is to be operated by the Consul General and an application has been filed by him covering operations in connection with said ship.

“Yours very truly,——”

Well, I believe it is “R. Everson, Assistant Cashier.” Over to the left: “CC: Chief National Bank Examiner, San Francisco, California.” With a rubber stamp: “11:00 a.m. November 3, 1941.”

Next document, your Honor is entitled: “Application for a license to engage in a foreign exchange transaction transfer of credit, payment, export or withdrawal from the [271] United States, or the earmarking of gold or silver coin or bullion or currency, or the transfer, withdrawal or exportation of, or dealing in, evidences of indebtedness or evidences of ownership of property.

“Application No. S. F. 11535.”

On top in handwriting. “No action.”

Below that handwritten notes: “Ourlet 10/29/41.)”

“To the Secretary of the Treasury,

“Washington, D. C.

“Sir:

“In accordance with Executive Order No. 8389 of April 10, 1940, as amended, regulating transactions in foreign exchange, etc., and the regulations and rulings issued thereunder, the undersigned hereby

applies for a license to execute the transaction described below.

“A. (1) The name of the application is Nippon Yusen Kaisya (NYK Line).

“(2) Applicant resides at, or in the case of a partnership, association or other organization, has its principal place of business at:

“500 California Street, San Francisco, California, U. S. A.

“(3) Applicant is and has been a citizen of Japan since September 29, 1885.

“(4) The nationality of the applicant is Japanese. [272]

“(5) Since 1885 the applicant has been engaged in the business of steamship freight and passenger transportation.

“B.”—To the left—“The applicant desires a license in order to:

“To handle the Japanese Government requisitioned ship ‘Tatuta Maru’ in the port of San Francisco, due on or about October 30, 1941, as authorized by the power of attorney executed by Yoshio Muto, Consul General of Japan at San Francisco, a notarized true copy of the original thereof is herewith attached.

“Such acting will involve assisting in issuing of tickets for passage fares at this San Francisco office and the sub-branch at Los Angeles, and other affairs in connection with the ship’s operation.

“All receipts and all disbursements incident to this operation are independent and bear no connection with the Nippon Yusen Kaisya funds.

“(C) On the second page.

“The application represents and warrants that no party other than those mentioned in item ‘B’ above has any interest, direct or indirect, in the transaction or transactions for which a license is applied for herein. If there are any exceptions, note them below.”

And it is to be noted, your Honor, there are no exceptions. [273]

Mr. Glicksberg: One moment. If you are reading, no objection; let us not testify.

Mr. Saroyan: There is a blank space.

Mr. Glicksberg: State it is blank.

Mr. Saroyan: Over to the left—“D. The applicant represents and warrants that all the facts herein stated are correct and true and that he does not have knowledge of any material facts in connection with such application which are not fully and accurately set forth herein. (Attach hereto schedules of any additional material information.)

“E. The applicant represents and warrants that he has complied, and agrees that he will comply, in all respects with Executive Order No. 8389 of April 10, 1940, as amended, and the regulations and rulings issued thereunder, and with any and all licenses issued to the applicant pursuant thereto, and that, with respect to the transaction here involved, no other application of the undersigned for a license has been filed, or is pending, except as follows:—
With a blank space.

To the right: “Nippon Yusen Kaisya (NYK Line) by —” the signature “Y. Taoka, Manager.”

“State of California,

“City and County of San Francisco:

“I, Y. Taoka, on oath, depose and say that I am the [274] applicant in the above application for license, or the manager, S. F. Branch, of Nippon Yusen Kaisya (NYK Line), who is the applicant in the above application for a license, and that I am duly authorized to make the foregoing application on behalf of the applicant; that I have personal knowledge of the facts as set forth in said application and know the same to be true and accurate; and that I do not have knowledge of any material facts in connection with such application which are not fully and accurately set forth herein.”

To the right the signature of “Y. Taoka.”

Underneath, “500 California Street,” address.

“Subscribed and sworn to before me this 22nd day of October, 1941.”

To the right the signature of “Nancy Everett, Officer Administering Oath, Notary Public in and for the City and County of San Francisco, State of California. My commission expires July 27, 1942.

“Recommendation of Federal Reserve Bank.

“To the Secretary of the Treasury:

“The above application is forwarded to the Secretary of the Treasury with the recommendation that a license should be granted in the following amount
.....”

Underneath that sentenced. “(Denied)”

Remarks column: “No action. (See attached letter.) [275]

“Respectfully, Federal Reserve Bank of San Francisco, by R. J. Patterson.”

The third sheet attached to this document, your Honor, is: “Consulate General of Japan, 22 Battery Street, San Francisco, California.

“October 17, 1941.

“To whom it may concern:

“Yoshio Muto, Consul General of Japan, San Francisco, California, U. S. A., as official representative of the Imperial Government of Japan, which Government has requisitioned the M. S. Tatuta Maru, for its needs and purposes, herewith authorizes Nippon Yusen Kaisya (NYK Line), 500 California Street, San Francisco, California, a corporation organized and existing under the laws of the Empire of Japan, to act as its attorney in fact in all matters, business, operations, and affairs, arising in connection with the call of the said M. S. Tatuta Maru at the Port of San Francisco, October 30, 1941, to November 21, 1941.

“This power and appointment is extended to cover in event the vessel arrives at an earlier date than above indicated and departs, because of circumstances, at a date later than November 2, 1941. The power to act applies during the vessel’s call at this port on her voyage 69-outward only.” [276]

Underneath: “Yoshio Muto (Signed), Consul General of Japan.”

Over to the left: “Subscribed and sworn to before me, this 21st of October, 1941, Nancy Everett, Notary Public,” with the usual notarial seal. You want me to read it?

Mr. Glicksberg: No, we can dispense with all of it.

Mr. Saroyan: Over to the right, Your Honor, a rubber stamp——

Mr. Glicksberg: I said we could dispense with it.

Mr. Saroyan: Eleven a.m., November 2, 1941. I ask that this document be marked as Defendant's Exhibit next in order.

Your Honor please, with your Honor's consent I can read four lines here in this letter for Mr. de Lorimier, the second paragraph.

Mr. Glicksberg: Your Honor please, the letter has been read in evidence.

The Court: No objection?

Mr. Glicksberg: No objection.

The Court: Proceed.

Mr. Saroyan: The second paragraph of this letter reads:

"No action is being taken with regard to your above mentioned application inasmuch as the 'Tatuta Maru' [277] is to be operated by the Consul General and an application has been filed by him covering operations in connection with said ship."

Mr. de Lorimier: All right.

Mr. Saroyan: Next, your Honor, I would like to read in evidence at this time plaintiff's Exhibit No. 22 entitled "Application for a License to Engage in a Foreign Exchange Transaction, Transfer of Credit, Payment, Export or Withdrawal from the United States, or the Earmarking of Gold or Silver Coin or Bullion or currency, or the Transfer, Withdrawal, or Exportation of, or Dealing in, Evidences of Indebtedness or Evidences of Ownership of Prop-

erty.” And with the same heading as the prior application. Application No. S. F. 11630.

“To the Secretary of the Treasury, Washington, D. C.

“Sir:

“In accordance with Executive Order 8389 of April 10, 1940, as amended, regulating transactions in foreign exchange, etc., and the regulations and rulings issued thereunder the undersigned hereby applies for a license to execute the transaction described below:

“A (1) The name of the applicant is Consulate General of Japan at San Francisco.

“(2) Applicant resides at, or, in the case of a corporation, partnership, association, or other organization, has its present place of business at: [278]

“22 Battery Street, San Francisco, California, U. S. A.

“(3) Applicant is and has been a citizen of Japan since March 11, 1874;

“(4) The nationality of the applicant is Japanese.

“(5) Since 1874 the applicant has been engaged in the business of Consulate.”

Under “Consulate” is the nature of the business.

“B. The applicant desires a license in order to:

“(State in detail the nature, purpose and amount of the transaction, and the name, address, nationality, and extent of interest of every party, including the applicant, involved or interested in the transaction.) Typewritten: “To receive a remittance in the amount of \$39,000 from the Imperial Govern-

ment of Japan into the blocked account of Consul General Yoshio Muto, with the Yokohama Specie Bank, Ltd., San Francisco, California, in order to make the ship's disbursements such as bunker and lubricating oil, provisions and running stores, port charges, passenger expenses and passage money, etc., for the Japanese Government requisitioned ship 'Tatuta Maru' in the port of San Francisco, due on or about October 30, 1941.

"The above remittance has been made through the Yokohama Specie Bank, Ltd., Tokyo, Japan, to the Yokohama Specie Bank, San Francisco, California, by telegraphic [279] transfer."

Page 2, paragraph C.

"C. The applicant represents and warrants that no party other than those mentioned in item B above has any interest, direct or indirect, in the transaction or transactions for which a license is applied for herein. If there are any exceptions, note them below."

With a blank space.

"D. The applicant represents and warrants that all the facts herein stated are correct and true and that he does not have knowledge of any material facts in connection with such applications which are not fully and accurately set forth herein. (Attach hereto schedules of any additional material information.)

"E. The applicant represents and warrants that he has compiled, and agrees that he will comply, in all respects, with Executive Order No. 8389 of April 10, 1940, as amended, and the regulations and rul-

ings issued thereunder, and with any and all licenses issued to the applicant pursuant thereto, and that, with respect to the transaction here involved, no other application of the undersigned for a license has been filed or is pending, except as follows:" With a blank space.

Over to the right, typed in: "Consulate General of Japan, at S. F." Under that line: "(Applicant) by [280] K. Inagaki," bearing the signature; under the line "K. Inagaki, Counsel," typewritten with the usual notary seal, signed by K. Inagaki, and subscribed and sworn to before Nancy Everett, Notary Public of the City and County of San Francisco on the 21st day of October, 1941.

"Recommendation of Federal Reserve Bank.

"To the Secretary of the Treasury:

"The above application is forwarded to the Secretary of the Treasury with the recommendation that a license should be granted in the following amount——"

Next line: "Denied. Refer application No. S. F. 11631 filed by Yokohama Specie Bank, Ltd., San Francisco, requesting authority to charge the blocked account of their Tokyo office in order to effect this payment. We are forwarding this application without recommendation. Please instruct. Respectfully, Federal Reserve Bank of San Francisco, by R. J. Patterson."

At this time, your Honor, I would like to read into evidence Plaintiff's Exhibit 29.

"Application No. S. F. 11631. Application for a license to engage in a foreign exchange transaction,

transfer of credit, payment, export, or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency, or the transfer, withdrawal, or exportation of, or dealing in, evidences of indebtedness [281] or evidences of ownership of property.”

With the same heading as the previous application.

“To the Secretary of the Treasury,

“Washington, D. C.

“Sir:

“In accordance with Executive Order No. 8389 of April 10, 1940, as amended, regulating transactions in foreign exchange, etc., and the regulations and rulings issued thereunder, the undersigned hereby applies for a license to execute the transaction described below:

“A (1) The name of the applicant is the Yokohama Specie Bank, Ltd.

(2) Applicant resides at or, in the case of a corporation, partnership, association or other organization, has its principal place of business at:

“415 Sansome Street, San Francisco, California;

“(3) Applicant is and has been a citizen of”——
blank space.

“(4) The nationality of the applicant is Japan.

“(5) Since 1886 the applicant has been engaged in the business of banking.

“B. The applicant desires a license in order to:

On October 21, 1941 we received telegraphic instructions from our Tokyo office, by order of foreign

office, Japan, to pay the sum of \$39,000 to Yoshio Muto, [282] Japanese Consul General here. (Official money.)

"We desire to secure a license in order to charge our Tokyo office blocked account with us with the said amount, and to pay the same to the blocked account of Yoshio Muto with us.

"Reviewed October 22, 1941, Richard C. Ramsey, Foreign Funds Control Examiner."

Second page:

"C. The applicant represents and warrants that no party other than those mentioned in item B above has any interest, direct or indirect, in the transaction or transactions for which a license is applied for herein. If there are any exceptions, note them below." Blank space.

Your Honor please, I won't read "D" and "E", because it is the same paragraph, pretending to represent a warranty that no other parties are interested.

Over to the right: "The Yokohama Specie Bank, Ltd., (Applicant), by——" the signature I can't—"S. Uno."

And so on, "Sworn to before Nancy Everett on the 22nd of October, 1941—" Correction, "Sworn to before Lillian Ralston, a Notary Public, City and County of San Francisco.

"Recommendation of Federal Reserve Bank.

"To the Secretary of the Treasury: [283]

"The above application is forwarded to the Secretary of the Treasury with the recommendation that

a license should be (granted in the following amount)——”

Next line: “(Denied). Refer to application No. S. F. 11630 filed by the Consulate General of Japan which is incidental to the within desired transaction. We are forwarding this application without recommendation. Please instruct.

“Federal Reserve Bank of San Francisco, by R. J. Patterson.”

Your Honor, at this time I would like to read into the record Plaintiff’s Exhibit No. 23.

“License No. S. F. 11630.”

Title: “Copy of license granted under the authority of Executive Order No. 8389 of April 10, 1940, as amended and the regulations and rulings issued thereunder.” Over to the left, hand written: “See license No. 11631.” To the left: “Treasury Department, Office of the Secretary.”

“To. (Name of licensee) Consulate General of Japan at San Francisco. (Address of licensee) 22 Battery Street, San Francisco, California.”

To the right: “cc: Yokohama Specie Bank, Ltd., San Francisco, California.”

Below: “cc: Chief National Bank Examiner, San Francisco, California.

“Sirs: [284]

“1. Pursuant to your application of October 21, 1941, the following transaction is hereby licensed.

“Receive not to exceed in the aggregate the sum of \$39,000 representing a remittance from the Imperial Government of Japan through the Yokohama Specia Bank, Ltd., Tokyo, Japan, and said Bank’s

San Francisco office, and deposit said funds into a special blocked account in the name of Consul General Yoshio Muto with the Yokohama Specie Bank, Ltd., San Francisco, California. The funds provided by the transfer herein authorized to be utilized solely for the purpose of ship's disbursements, under special license authorizing such disbursements, in connection with the Japanese Government requisitioned ship 'Tatuta Maru' due in port in San Francisco on or about November 1, 1941.

"This license is authorized with the provision that payment is made to a special blocked account in the name of Consul General Yoshio Muto, as a 'National' of Japan, in the Yokohama Specie Bank, Ltd., San Francisco, California."

Over to the left, hand-written: "November 28, 1941."

To the right: "Completed, October 29, 1941."

"2. This license is granted upon the statement and representations made in your application, or otherwise filed with or made to the Treasury Department as a supplement [285] to your application, and is subject to the conditions, among others, that you will comply in all respects with Executive Order No. 8389 of April 10, 1940, as amended, the regulations and rulings issued thereunder and the terms of this license.

"3. Within one week after the license expires, or within one week after the transaction covered by the license is consummated, whichever date is earlier, the licensee shall file with the Federal Reserve

Bank through which the license was issued a report on Form TFER-1. The licensee shall also furnish and make available for inspection any additional relevant information, records or reports requested by the Secretary of the Treasury, the Federal Reserve Bank, through which the license was issued, the Postmaster at the place of mailing, or the collector of Customs at the port of exportation.

“4. This license expires 30 days from the date of its issuance, is not transferable, is subject to the provisions of Executive Order No. 8389 of April 10, 1940, as amended, and the regulations and rulings issued thereunder, and may be revoked or modified at any time in the discretion of the Secretary of the Treasury acting directly or through the agency through which the license was issued, or any other agency designated by the Secretary of the Treasury. If this license was issued as [286] a result of wilful misrepresentation on the part of the applicant or his duly authorized agent, it may, in the discretion of the Secretary of the Treasury, be declared void from the date of its issuance, or from any other date.

“Issued by direction and on behalf of the Secretary of the Treasury.

“Federal Reserve Bank of San Francisco, by R. J. Patterson.”

“The Act of October 6, 1917, as amended, provides in part as follows:”

And I will read the penalty portion—

The Court: Unless you are anticipating any difficulty.

Mr. Saroyan: Your Honor, at this time I wish to read into the record Plaintiff's Exhibit No. 28, entitled:

"License No. 11774, dated October 24, 1941. Copy of license. Granted under the authority of Executive Order No. 8389 of April 10, 1940, as amended, and the regulations and rulings issued thereunder.

"To (Name of licensee) Consulate General of Japan, at San Francisco. (Address of licensee) 22 Battery Street, San Francisco, California. cc: Yokohama Specie Bank, Ltd., San Francisco, California. cc: Chief National Bank Examiner, San Francisco, California.

"Sirs:

"1. Pursuant to your application of October 24, 1941, the following transaction is hereby licensed.

"Receive income in the approximate amount of \$68,000, resulting from the operation of the Japanese Government requisitioned ship 'Tatuta Maru' due in port in San Francisco on or about November 1, 1941, and deposit all of said income in a special blocked account in the name of Consul General Yoshio Muto in the Yokohama Specie Bank, Ltd., San Francisco, California, said funds to be utilized in connection with the operation of the hereinabove named ship under special license authorizing such disbursements.

"Estimated revenue from the source indicated in your application.

"Passage fares, excess baggage, and mail earnings, including U.S. tax, at San Francisco."

Over to the right with a top heading of "Approxi-

mately" on top. "\$43,000.00." At Los Angeles, \$25,000.00, total \$68,000.00.

"This license is authorized with the provision that all funds collected or received in connection with the operation of said ship shall be deposited in a special blocked account in the name of Consul General Yoshio Muto, as a 'National' of Japan, in the Yokohama Specie Bank, Ltd., San Francisco, California."

Your Honor please, at this time I will not read 2, 3, or 4, and the penalty clause, which is the same in each of the [288] licenses.

At this time, your Honor, I would like to read Plaintiff's Exhibit 27 into the record. Entitled: "Form TFER-1 (Revised) Treasury Department, Office of the Secretary.

"Report to be filed by persons issued licenses on form TFEL-1.

"To the Secretary of the Treasury, Washington, D. C.

"Sir:

"A. The name and address of the licensee is: The Yokohama Specie Bank, Ltd."

Under that line, the name of the licensee, under that line, "(Address of licensee)" in blank.

"B. The date of issuance and serial number of the license is: October 29, 1941; S.F. 11631.

"C. The transactions covered by such license were consummated as follows:

"(State in detail all of the facts relating to the consummation of the transactions covered by such license.)

“Telegraphic transfer from the Yokohama Specie Bank, Ltd., Tokyo, Japan, on October 21, 1941, to pay Yoshio Muto, Japanese Consulate, the sum of \$39,000.00 completed by depositing said sum to credit of special blocked account in the Yokohama Specie Bank, Ltd., San Francisco, in the name of Consul General Yoshio Muto.

“D. The licensee represents that he has complied in [289] all respects with the provisions of Executive Order No. 6560 of January 15, 1934, as amended, and the regulations issued thereunder, and has complied in all respects with the terms of the license described in item B.”

Over to the right in typing: “The Yokohama Specie Bank, Ltd., by S. Uno.”

With the notarial seal, and was sworn to before Lillian Ralston, Notary Public, of the City and County of San Francisco on November 4, 1941.

Your Honor please, at this time I wish to offer in evidence a document which purports to be an application for a license to engage in a foreign exchange transaction, with the same heading as the previous application.

“Application No. S.F. 11537.

“To the Secretary of the Treasury, Washington, D. C.

“Sir:

“In accordance with executive order 8389 of April 10, 1940, as amended, regulating transactions in foreign exchange, etc., and the regulations and rulings issued thereunder, the undersigned hereby applies

for a license to execute the transaction described below:

“A. (1) The name of the applicant is Consulate General of Japan at San Francisco.

“(2) Applicant resides at or, in the case of a [290] corporation, partnership, association or other organization, has its principal place of business at:

“22 Battery Street, San Francisco, California, U.S.A.

“(3) Applicant is and has been a citizen of Japan since March 11, 1874.

“(4) The nationality of the applicant is Japanese.

“(5) Since 1874 the applicant has been engaged in the business of Consulate.

“B. The applicant desires a license in order to:

“To operate the Japanese Government requisitioned ship ‘Tatuta Maru’, in the port of San Francisco, due on or about October 30th, 1941.

“The following estimated disbursements as shown hereunder will be made through the blocked account of Consul General Yoshio Muto with the Yokohama Specie Bank, Ltd., San Francisco, California.

“Passenger expenses” over to the left.

“1. Handling fees for passenger agents.” To the right under the heading “Estimated”, “\$2,800.00.

“2. Aliens’ detention expenses, \$1,300.00.

“3. Stevedoring and drayage on baggage \$1,500.00.

“Total \$5,600.00.”

Another heading: “Passenger taxes and adjustments.

“1. Alien head tax payable to United States Government \$1,000.00. [291]

“2. Government tax on tickets, 5 per cent, and stamp tax \$6,000.00.

“3. Refunds and adjustments of passage money \$2,000.00.”

Total: “\$9,000.00.” Recapitulation total, “\$14,600.00.”

Your Honor, I will not read paragraphs No. C, D, and E, which are the usual representations and warranties, merely state they were sworn to by K. Inagaki, Consul, under the heading of Consul General of Japan, in San Francisco, before Nancy Everett, the 21st day of October, 1941. With the same notation at the bottom: “We are forwarding this application without recommendation. Please instruct. Federal Reserve Bank of San Francisco.”

Your Honor please, at this time——

Mr. Glicksberg: What is that? Has that been given a number?

Mr. Saroyan: Do you want to give it a number before I proceed further?

The Court: Admitted next in order.

The Clerk: Defendant's Exhibit E admitted and filed in evidence.

(Whereupon the application above referred to, No. 11537, marked Defendant's Exhibit E, was received in evidence.)

Mr. Saroyan: Your Honor please, wish to read into the record Defendant's Exhibit E, copy of a license, license No. [292] S.F. 11537, dated October 29, 1941.

“To (Name of licensee) Consulate General of Japan at San Francisco, 22 Battery Street, San Francisco, California.” Over to the right: “cc: Yokohama Specie Bank, Ltd., San Francisco, California. cc: Chief National Bank Examiner, San Francisco, California.

“Sirs:

“1. Pursuant to your application of October 21, 1941, the following transaction is hereby licensed:”

Mr. Glicksberg, will you be willing to stipulate so that I won't burden the Court with too much reading, that the license on the application shown is a license—in other words, this is a license pursuant to the application, the application showing a license to disburse \$14,600.00?

Mr. Glickberg: I assume the exhibit has both of those instruments?

Mr. Saroyan: That is right.

Mr. Glickberg: They are in evidence, don't need to stipulate.

Mr. Saroyan: All right. Now, your Honor, there are 1, 2, 3, 4 further such disbursement applications which I am not going to read, but merely I will ask that they be marked as defendant's exhibit next in order. I think each one should be given a separate number, of which these four disbursement applications are just like the previous application, and ask that [293] they be marked as the Defendant's Exhibit next in order.

Mr. Glicksberg: No objection, except for the record I would like to have it noted.

Mr. Saroyan: I will refer to the license——

Mr. Glicksberg: The particular dates for the record.

Mr. Saroyan: I can do that very easily in a few sentences. Each one has a license number and the date of application and the amount which is applied for and the license attached.

The Court: The Clerk is concerned how he will mark them.

Mr. Saroyan: He can mark them individually. In other words, give a number to each one, a separate number.

The Court: Very well, so ordered.

The Clerk: Defendant's Exhibit F admitted and filed in evidence.

Defendant's Exhibit G admitted and filed in evidence.

Defendant's Exhibit H admitted and filed in evidence.

Defendant's Exhibit I admitted and filed in evidence.

Mr. Saroyan: Your Honor please, Defendant's Exhibit F is an application filed October 22, 1941 and shows a license dated October 29, 1941, No. 11538, and also has attached a TFEL-1 report dated November 12, 1941, licensing the Consulate General of Japan at San Francisco to disburse the sum of \$5,991.75 from the special blocked account in the name of Consul General Yoshio Muto to cover disbursements to the account of Mitsubishi Soji Kaisya, Ltd., with their Bank of America NP&SA. Is that [294] a fair enough statement?

Mr. Glicksberg: Just the number and the dates.

We can see they are all licenses, were granted for disbursements set forth in our exhibit, Plaintiff's Exhibit 2.

Mr. Saroyan: Defendant's Exhibit G, your Honor, is application dated October 21, 1941. There is a license date of October 31, 1941, to which there is attached at TFEL-1 Report dated November 12, 1941, executed by the Consulate General of Japan at San Francisco. And the license, the license number is 11539, and licensed the expenditure of \$204.74 by a check dated November 7, 1941, check No. 4 to General Petroleum Corporation of California.

Your Honor please, Defendant's Exhibit I is an application dated October 22, 1941, has a license attached to it dated October 29, 1941. It is license No. 11541, and the license is for the sum of \$14,200.00 of the Consul General of Japan, San Francisco, to effect disbursement not to exceed in the aggregate sum of that amount for provisions and supplies.

Your Honor please, next is defendant's Exhibit H, application dated October 21, 1941. License dated October 29, 1941, license No. 11540, issued to Consul General of Japan at San Francisco. License is to effect disbursements not to exceed in the aggregate amount of \$4,000.00 with the operations of the Japanese Government requisitioned ship Tatuta Maru, consisting of pilotage and tugboat, stevedoring and drayage, and so forth. [295]

Mr. Glicksberg, will you at this time furnish me with your copy of the application 12971?

Mr. Glicksberg: A copy of the application?

Mr. Saroyan: That is what I asked for the other day, you had a copy of the application here in the sum of \$47.71, which was licensed to be paid to this account, NYK, as an agency of other incidental expenses.

Mr. Glicksberg: I take it you are referring to the license of the Consul General?

Mr. Saroyan: I am referring to the license that was applied for by the Consul General Yoshio Muto to pay to NYK Line here in San Francisco the sum of \$4,771.58 to cover the following: "5 per cent on \$61,282.90, passage money booked by NYK direct. 2½ per cent on \$41,503.40."

I want the application.

Mr. Glicksberg: It is the Consul General?

Mr. Saroyan: The Consul General, copy of the Consul General's application.

Mr. Glicksberg: We have the records of the Consul General all kept by the NYK in our possession.

Mr. Saroyan: I ask you to furnish the application to me because——

Mr. Glicksberg: I have no application. I have a copy here in the records of the Consul General which came to the Trustee in Bankruptcy that you can use. [296]

Mr. Saroyan: Mr. Glicksberg, I am merely asking you to furnish me the copy of the application that you and I were just——

Mr. Glicksberg: This is the Consul General's papers which were——

Mr. Saroyan: That isn't it.

Mr. Glicksberg: The NYK's file you can use if you want to refer to them. I have no objection, they are copies.

Mr. Sarolyan: Your Honor please, at this time I wish to offer in evidence an application for a license to engage in a foreign exchange transaction.

Mr. Glicksberg: That is a copy of an application.

Mr. Saroyan: Copy of an application.

Mr. Glicksberg: Found in the records of the Trustees.

Mr. Saroyan: Entitled: "Application for license to engage in a foreign exchange transaction * * *" with the same heading as the previous applications. We haven't been able to locate that, appears we have the license, but not the——

Mr. Glicksberg: Not objecting to a duplicate copy which was found in the possession of NYK, the records of the Consul General, which were in the possession of the NYK.

Mr. Saroyan: I would like to offer this application. Mark it for me, please, as Defendant's Exhibit next in order.

The Court: It may be marked next in order.

The Clerk: Defendant's Exhibit J admitted and filed in [297] evidence.

(Whereupon the application above referred to, marked Defendant's Exhibit J, was received in evidence.)

Mr. Saroyan: At this time, your Honor, I would like to read into the record from a copy of an ap-

plication for a license to engage in a foreign exchange transaction furnished me, addressed:

“To the Secretary of the Treasury, Washington, D. C.

“Sir: With the usual provisions and in accordance with the Executive Order, and so on.

“A. (1) The name of the applicant is Consulate General of Japan at San Francisco;

“(2) Applicant resides at or, in the case of a corporation, partnership, association or other organization, has its principal place of business at:

“22 Battery Street, San Francisco, California, U.S.A.

“(3) Applicant is and has been a citizen of Japan since March 11, 1874.

“(4) The nationality of the applicant is Japanese.

“(5) Since 1875 the applicant has been engaged in the business of Consulate.

“B. The applicant desires a license in order to:

“To pay the sum of \$4,771.58 into the blocked account of Nippon Yusen Kaisya with the Yokohama Specie Bank, Ltd., San Francisco, California, from our special [298] blocked account with the Yokohama Specie Bank, in San Francisco, California, covering the following expenses in connection with handling of Japanese Government requisitioned ship; Tatuta Maru, Voyage No. 69, which arrived October 30 and sailed November 2:

“Handling Commission on Passage and Excess Baggage and Freight.”

Over to the left: "5 per cent on \$61,282.90, passage money booked by NYK direct."

Over to the right: "\$3,064.15."

Over to the left: "2½ per cent on \$41,503.40, passage money booked by sub-agents."

Over to right: "\$1,037.59."

Over to the left: "5 per cent on \$3,396.80, excess baggage and freight."

Over to the right: "\$169.84."

Over to the left: "Agency fee for handling ship in San Francisco, \$500.00."

Items total: "\$4,771.58."

"(Handling Commission and agency fee are the reasonable and customary charges for a steamship agent in the United States.)"

At the bottom, with a rubber stamp: "Closed November 8, 1941."

On the opposite side—I will not read the same paragraphs [299] C, D, and E, pertaining to representation and warranties.

Over to the right: "Consulate General of Japan at San Francisco (Applicant) by K. Inagaki, Consul."

Following with the notarial seal.

At this time, your Honor, I wish to offer in evidence a document which purports to be a license No. 12971, dated November 19, 1941, and ask it be marked Defendant's Exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit K admitted and filed in evidence.

(Whereupon the document above referred to, marked Defendant's Exhibit K, was received in evidence.)

Mr. Saroyan: May I state I am reading from Defendant's Exhibit K, license No. S.F. 12971, dated November 19, 1941, to the Consul General of Japan at San Francisco, 22 Battery Street, San Francisco, California. Over to the right:

"cc: Yokohama Specie Bank, Ltd., San Francisco, California.

"cc: Chief National Bank Examiner, San Francisco, California.

"Sirs:

"(1) Pursuant to your application of November 8, 1941, the following transaction is hereby licensed.

"Withdrawal, not to exceed in the aggregate, the sum of \$4,771.58 from your blocked special account with the Yokohama Specie Bank, Ltd., San Francisco, California, and [300] pay a like amount to Nippon Yusen Kaisya (NYK Line) for deposit to a blocked account in their name, maintained with the same bank. This payment to cover the following expenses in connection with the handling of Japanese Government requisitioned ship, Tatuta Maru, voyage 69:

"5 per cent on \$61,282.90 passage money booked by NYK direct, \$3,064.15.

"2½ per cent on \$41,503.40, passage money booked by sub-agents, \$1,037.59.

"5 per cent on \$3,396.80, excess baggage freight, \$169.84.

“Agency fee for handling ship in San Francisco, \$500.00.”

Items total \$4,771.56.

Over to the right a rubber stamp: “November 21, 1941.

“This license is issued with the provision that deposit shall be made to a blocked account in the name of Nippon Yusen Kaisay (NYK Line) as ‘nationals’ of Japan in the Yokohama Specie Bank, Ltd., San Francisco, California.”

In the lower space, hand-written: “License completed November 21, 1941. M. Ramsey.”

I will not read paragraphs 2, 3 or 4.

“Federal Reserve Bank of San Francisco, by R. J. Patterson.”

Now, the second page of Exhibit K, a rubber stamp: [301]

“November 21, 1941”, with an endorsement hand-written,

“\$4,771.58.”

The Court: Take a recess.

(Short recess.)

Mr. Saroyan: Your Honor please, the defendant Superintendent of Banks at this time wishes to call Mr. Harold Wilson.

HAROLD F. WILSON

was called as a witness on behalf of Defendant, Superintendent of Banks, and being previously sworn, testified as follows:

The Court: You have been sworn.

(Testimony of Harold F. Wilson.)

The Witness: Yes.

Mr. Saroyan: Step up, you may take the stand.

The Clerk: Harold F. Wilson to the stand, heretofore sworn.

Direct Examination

Mr. Saroyan: Mr. Wilson, you testified yesterday you were familiar with all the documents, papers and records of the Yokohama Specie Bank, Ltd., San Francisco office, is that correct?

A. I believe that I am. I don't recall whether I testified or not, but I believe I am familiar with them.

Q. Well, I want to ask you this question: Are all the records in the English language?

A. No, sir. [302]

Q. And some of the records are in Japanese?

A. Yes, some of the records are.

Q. And has anything been done in reference to the records that are in Japanese? A. Yes, sir.

Q. What?

A. During the period that I was in charge of the bank, when it was located at 415 Sansome Street, and because some of the records were in Japanese it was felt desirable that we should know as much as it was possible to know what those Japanese records contained, not only for the purpose of our own needs, but because at that time we were working with the F.B.I. and Naval Intelligence, the Army Intelligence. So we employed translators, and I believe those translators were at the bank one or two—for a period of possibly two years translating

(Testimony of Harold F. Wilson.)

as much of the Japanese writings or records as we could possibly have done within that time, and that, so when we moved out of the bank we would be able to have all the information catalogued and inventoried so that if an occasion arose some time in the future we might be able to locate any and all information that might have been required from whoever was entitled to receive the information.

Q. Thank you. Mr. Wilson, from your examination of the records of the bank, especially the Japanese records as translated, were you able to find any reference to NYK in those records in respect to Yoshio Muto, Consul General account? [303]

Mr. Glicksberg: Object, your Honor please, to the witness testifying about translations which were made. I have no objection to the question being asked,—to the question whether he found any record at all pertaining to—any indication of the account Yoshio Muto with the NYK. I have no objection to that portion.

Mr. Saroyan: The witness has testified all these records were translated from Japanese to English under his control and supervision while he was in charge. I am asking him this question: From the translations was he able to determine whether any records there at all pertaining to the Yoshio Muto General Account that had any reference to NYK—

Mr. Glicksberg: Objection raised again unless we have the translator who has gone into those particular records. This witness isn't qualified, just making a statement somebody else told him, or read-

(Testimony of Harold F. Wilson.)

ing from some English translation by a translator.

Mr. Saroyan: Your Honor please, such a preliminary question, only as to any reference to NYK.

The Court: He takes the legal position that the foundation hasn't been laid.

Mr. Saroyan: Withdraw the question, your Honor.

The Court: I understood your objection——

Mr. Saroyan: Is that your objection, the proper foundation hasn't been laid? [304]

Mr. Glicksberg: The proper foundation hasn't been laid. Furthermore, the witness isn't qualified to answer.

The Court: In what respect is he not qualified, so we will be able to pursue it.

Mr. Glicksberg: He isn't qualified to answer the question other than from his own examination of the records at the bank since he stated that he can't read Japanese and therefore had to have them translated.

Mr. Saroyan: Your Honor, on second thought I submit that the question is proper. If this witness isn't qualified to answer I don't know who else could be. He was in charge of the Bank's affairs from two weeks after it was taken over back in 1942, until the Yokohama Specie Bank doors closed in 1945 on Sansome Street and since then in the offices of the State Banking department. Now, how could it be said he isn't qualified when all the records are within his control and supervision and direction?

(Testimony of Harold F. Wilson.)

The Court: I think he is qualified if you lay a foundation.

Mr. Glicksberg: No, not qualified to answer this question.

Mr. Saroyan: Q. Mr. Wilson, were all of the records of the bank translated under your direction and control and supervision?

A. All those records which were translated were under my [305] supervision and direction.

Q. How much of the records were so translated?

A. That is a very difficult question for me to answer, Mr. Saroyan. The amount of translation was in the form of letters, both to and from Japan, rather than the books of account. The books of account were kept in English because they were required to be kept in English under the State Bank Act. But, your Honor, I hesitate to make an estimate of the volume, there was considerable volume, took the translators months to perform their job of making the translations.

The Court: You say they were catalogued?

The Witness: Yes, sir, and an inventory has been made under subjects, sir.

The Court: In one volume?

The Witness: Well, after—I might explain, sir, that when we were obliged to move from 415 Sansome Street, which was the premises of the Yokohama Specie Bank, we placed all the records in storage at 5th and Mission in the old Mint Building, in order that we might be able to locate any and all records pertaining to any particular subject. We in-

(Testimony of Harold F. Wilson.)

ventoried and catalogued them, and filed them in boxes in racks, and that was what I meant, sir, by an inventory and a catalogue. We have so far been able to find most any sort of a record that pertains to the bank's operations that we have been called upon to produce. [306]

Mr. Saroyan: Q. Are you familiar with that catalogue? A. Yes, sir.

Q. Does that catalogue show any papers, any letters made in Japanese in respect to the Yoshio Muto Account where reference is made to NYK?

A. I feel obliged to answer that in this way, Mr. Saroyan. That I have found no translations or copies of letters in Japanese in connection with the Yoshio Muto Consul General account in so far as it applies to the NYK.

Q. Mr. Wilson, referring to the records, do the records of the Yokohama Specie Bank, Ltd., San Francisco office, show anywhere that there are any moneys or amounts paid out of this account, Consul General Yoshio Muto, to NYK in San Francisco?

A. In the bank's records we found a copy of a license No. S.F. 12971, dated November 19, 1940, to the Consul General of Japan in San Francisco, 22 Battery Street, San Francisco, which has other information. Do you wish me to read it, sir?

Q. Yes, I do, if you will.

Mr. Glicksberg: Introduced in evidence, isn't it?

Mr. Saroyan: Yes, it has been, Mr. Glicksberg.

Mr. Glicksberg: I think you have read it into evidence.

(Testimony of Harold F. Wilson.)

Mr. Saroyan: Q. Did you have reference, Mr. Wilson, to——

The Court: The witness says there is a copy of it in [307] evidence.

Mr. Saroyan: Q. Defendant's Exhibit K, is that the document you have reference to?

A. Yes, sir.

Q. All right. A copy of Defendant's Exhibit K was found in the records of the Yokohama Specie Bank, isn't that right? A. Yes, sir.

Q. Now, what else? Did you find anything else?

A. Yes, sir, but may I explain this a little further?

Q. Yes, you can.

A. On the face of this copy of license, which is part of the records of the Yokohama Specie Bank, it has on the front: "License completed November 21, 1941," with the signature "M. Ramsey."

The Court: Who is that?

The Witness: M. Ramsey was a foreign funds control representative stationed at the bank on behalf of the National Bank Examiner's office of the Federal Reserve Bank. No transaction for the payment of money could be made without approval of a foreign funds control representative.

On the reverse side of this copy of license is the date November 21, 1941, with the amount \$4,771.58, and by reference to the ledger sheet Consul General Yoshio Muto special account under date of November 21, 1941, there is a debit, \$4,771.58, which corresponds to the amount permitted to be [308]

(Testimony of Harold F. Wilson.)

withdrawn from the account under this license.

Q. (By Mr. Saroyan): And is withdrawn and paid to NYK, is that correct?

A. I can only say that there was a debit to the account in accordance with the license.

Q. Now, do you know what happened to that \$4,771.58?

A. I can explain it in this way, Mr. Saroyan.

Q. Yes.

A. That there was an account, a checking account in the Yokohama Specie Bank in the name of Nippon Yusen Kaisya, and in that account on November 21 there is a credit to the account in the amount of \$4,771.58, which offsets the debit to the account Consul General Yoshio Muto Special Account on November 21 in the same amount.

Q. You have a copy of the ledger entry showing that credit? A. I have.

The Court: Just read it.

Mr. Saroyan: Let me have this.

Mr. Glicksberg: We will stipulate it was received.

Mr. Saroyan: Will you stipulate?

Mr. Glicksberg: \$4,771.00.

Mr. Saroyan: Mr. Glicksberg, will you stipulate that prior to the taking over of the Yokohama Specie Bank there was an account on deposit in the name of Nippon Yusen Kaisya and on the date of taking there was a balance in that account of the [309] sum of \$6,394.71?

Mr. Glicksberg: Don't know the amount, but I

(Testimony of Harold F. Wilson.)

would stipulate that from the record that the plaintiff introduced, plaintiff's Exhibit No. 2, on November 21, 1941, from the consular account, Yoshio Muto special account, check book, which was in the possession of NYK taken over by the trustee, a check in the sum of \$4,771.58 was given to the Yokohama Bank to the deposit of NYK and NYK received it. From records we produced here.

Mr. Saroyan: Yes.

Mr. Glicksberg: We will stipulate to save time.

Mr. Saroyan: Very good.

Mr. Glicksberg: We will object to this letter, if your Honor please.

Mr. Saroyan: Your Honor please, throughout the trial counsel has interjected statements or inferences that the Superintendent should not be defending this case. This clears the record in that regard and only for that purpose alone I wish to offer in evidence at this time a letter dated June 27, 1949, written by David L. Bazelon, Assistant Attorney General, Director, Office of Alien Property, to Mr. Louis J. Glicksberg, Esq., 1 Montgomery Street, San Francisco, 4, California, and ask it be marked Defendant's Exhibit——

Mr. Glicksberg: I will object to it, your Honor. It is entirely irrelevant, immaterial, not within the issues of [310] this case. Mr. Saroyan is evidently trying to call to your Honor's attention Mr. Glicksberg's transactions with Mr. Bazelon. It is a letter which was written to Mr. Glicksberg pertaining to

(Testimony of Harold F. Wilson.)

the trial of this case, when it was coming on, and I think it is entirely inadmissible.

The Court: If it is admitted for the purpose of the offer, I will allow.

Mr. Glicksberg: I think if it is allowed then I would like to have it read.

Mr. Saroyan: I will read the portion I want.

Mr. Glicksberg: Read the whole letter.

The Clerk: Defendant's Exhibit L marked for identification.

(Whereupon the letter above referred to, dated June 27, 1949, was marked Defendant's Exhibit L for identification.)

Mr. Saroyan: Reading from Defendant's Exhibit L, a letter dated June 27, 1949.

"Department of Justice, Office of Alien property,
"Washington 25, D. C.

"Louis J. Glicksberg, Esq.,

"1 Montgomery Street,

"San Francisco, California.

"Re: Yoshio Muto Special Account, Civil Action
No. 22509-S."

Reading from the third paragraph to Mr. Glicksberg: [311]

"Whether the photostatic copies of documents obtained by you in Japan should be introduced by stipulation in this litigation, or whether depositions should be taken in Japan, is a question which we feel should be decided by Mr. S. M. Saroyan, the attorney for Mr. Maurice C. Sparling, the Superin-

(Testimony of Harold F. Wilson.)

tendent of Banks of the state of California, and the liquidator of Yokohama Specie Bank, Ltd., San Francisco office, who will defend the action.”

There is quite a bit more to the letter, but I don't wish to take the Court's time now. If counsel wants to read it, he can.

Mr. Glicksberg: For the record the whole letter is introduced in evidence, if your Honor please.

The Court: The whole letter is in evidence so that it may be available to either side for any purpose they see fit.

The Clerk: Defendant's Exhibit L admitted and filed in evidence.

(Whereupon the document referred to was received in evidence as Defendant's Exhibit L.)

Mr. Saroyan: Q. Mr. Wilson, from your records can you tell us how many deposits were made to the account of Yoshio Muto, Consul General of Japan?

A. Fifteen different deposits.

Q. Fifteen different deposits.

A. Fifteen individual deposits.

Q. Will you tell us from your records how many licenses your records disclosed?

A. Any particular kind of licenses, sir?

Q. Licenses to receive money. A. Two.

Q. Two? A. Yes, sir.

Q. And what were they?

A. The license covering the \$39,000 transaction and the license—I believe you have taken it from me, sir, for the one covering the \$68,000. Yes, sir.

(Testimony of Harold F. Wilson.)

Q. And how many deposits do your records show that were made under the license authorizing receipt of \$68,000? A. Fourteen.

Q. Fourteen. And according to your records, Mr. Wilson, how many treasury licenses did you find authorizing disbursements of moneys?

A. Six.

Mr. Saroyan: With the Court's direction there were six introduced in evidence.

That is the defendant Superintendent of Banks' case, your Honor. [313]

Mr. Glicksberg: No questions.

The Court: Mr. Wilson, thank you very much. I regret that you couldn't leave here with a better impression of our effort here to do the things that are expected of us. Don't be too severe with us.

The Witness: Thank you, sir.

Mr. de Lorimier: If your Honor, please, I have only a few remarks to make. As I stated before, due to the supervisory order from the Office of the Alien Property, which was read and placed in evidence by Mr. Saroyan, this morning before your Honor, recognizing that the Alien Property Custodian made the Superintendent of Bank of California as agent and attorney relative to the account of the Consul General of Japan in San Francisco.

In this regard I wish to call attention to the telegram which we received and I will quote. This telegram is dated March the 21st, 1951, and is addressed to Mr. Valentine Hammack, Manager of the Federal Office of O.P.A.

“This will confirm today’s telephone advice that we desire you to actively assist Saroyan in obtaining decree that Muto account belongs to Juto, or Japanese Government and not to NYK.”

I would also like to quote a portion of a letter received relative to the Government’s position in this case. Not long—it is a long letter, but only quoting a portion of it: [314]

“If the Trustee of NYK is able to establish Nippon Yusen ownership of the Muto account in the pending litigation this office will take the position that this account should be treated as like other accounts of the NYK heretofore held covered by the vesting order 371——” You understand we are,—I am figuring on war—I am ahead of myself——“which vested all right, claim of NYK to property of the United States held by the Trustee and we will therefore approve payment of any liquidating dividends declared thereon to the Trustee; if, however, it is shown in the pending litigation that the funds in question are part of the property of the Japanese Government, that is to say, owned by Muto, then of course this account should be paid over to the office of Alien Property. Our participation in the action should be on this ground, which is based on facts indicated, that funds were received by Muto from the Japanese Government, which secured them from NYK on a loan basis.

“In this connection please note copy of letter dated June 4, 1943, and signed by”—I haven’t the letter—“in which it is stated that the funds in question belong to the Japanese Government.”

I can obtain that if your Honor wishes. This letter not marked, I haven't got it, but I mean to say that is the substance of that. [315]

Now, also in this connection,——

Mr. Glicksberg: Your Honor please, I only interrupt for the record—I am sorry, only for the record——

Mr. de Lorimier: Do you want to have that letter?

Mr. Glicksberg: I don't know whether counsel representing the United States Government, the office of Alien Property Custodian, is presently making his opening statement or whether this is the evidence that he is presently presenting. As such, in so far as evidentiary matter, I would like to have my objection.

Mr. de Lorimier: You can object any time you want. I am just putting in—what I am going to do now, Mr. Glicksberg, is to put in the vesting order. That is really what I am trying to do; the other part is preliminary to that.

Mr. Glicksberg: I assuming counsel is proceeding with the case as plaintiff in intervention in chief.

Mr. de Lorimier: In a sense, I am, that is what I am doing.

Mr. Glicksberg: Then I suggest a portion of counsel's remarks which pertains to letters are inadmissible.

Mr. de Lorimier: Which do you mean?

Mr. Glicksberg: All the letters read are inadmissible. I have no objection of your Honor taking

note for whatever worth; if instructions to counsel be as evidence I must object they are inadmissible.

Mr. de Lorimier: Now, your Honor, for the record I wish to place in evidence a certified copy of the vesting order vesting all right, title and interest of Yoshio Muto, former Consul General of Japan in San Francisco to the account which is now the subject matter of this action. What is it, \$6,000, something, it isn't stated in this.

Mr. Saroyan: You mean the NYK account?

Mr. de Lorimier: Yes.

Mr. Glicksberg: For the record——

Mr. de Lorimier: You want me to read it?

Mr. Glicksberg: I am sorry.

Mr. de Lorimier: You have a copy of it?

Mr. Glicksberg: Counsel, your discussions between Mr. Saroyan and yourself, I don't want as evidence in the case.

Mr. de Lorimier: You don't want the vesting order?

Mr. Glicksberg: I have no objection to the vesting order if you are introducing it in evidence,—I will stipulate it may go in.

Mr. de Lorimier: That is what—will you stipulate it can go in?

Mr. Glicksberg: Surely; which one?

Mr. de Lorimier: 269, I think it is.

Mr. Glicksberg: 256.

Mr. de Lorimier: 256, yes. [317]

Mr. Glicksberg: September 7.

Mr. de Lorimier: Yes.

Mr. Glicksberg: No objection to the vesting order 256 going in.

The Court: Admitted and marked, made part of the record.

Mr. Glicksberg: All right.

Mr. de Lorimier: You have no objection.

Mr. Saroyan: No objection.

Mr. de Lorimier: Do you want me to read it?

The Court: You offered it in evidence, let it go in.

Mr. de Lorimier: The finding is simply this: “* * * that Yoshio Muto, who was formerly Consul General of Japan in San Francisco, is a national of a designated enemy * * *”

And then there is a long thing about the finding here, that and all title. Do you want me to read that?

That: “All right, title, interest and claim of any name or nature whatsoever of the aforesaid Yoshio Muto, Nippon Yusen Kaisya, and the latter’s San Francisco branch, and each of them, in and to all indebtedness, contingent or otherwise, and whether or not matured, owing to them or any of them by the aforesaid Yokohama Specie Bank, Ltd., or by its said San Francisco branch or by the aforesaid Superintendent of Banks, including, but not limited to all security rights in and to any and all [318] collateral for any and all of such indebtedness and the right to sue for and collect such indebtedness,

“is (a) an interest in a business enterprise within the United States (namely, the aforesaid Yokohama Specie Bank, Ltd., and/or its San Francisco Branch) held by a national or nationals of an

enemy country (Japan) and also is (b) property within the United States owned or controlled by a national or nationals of a designated enemy country (Japan) and also is (c) property which is payable or deliverable to, or claimed by, a national or nationals of a designated enemy country (Japan) and which (as hereinbefore stated in subparagraph 3) is in the process of administration by a person acting under judicial supervision;

“7. Determining that to the extent that such nationals, or any of them, are persons not within a designated enemy country, the national interest of the United States requires that such persons and each of them be treated as nationals of the aforesaid designated enemy country (Japan);

“8. Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise; and

“9. Deeming it necessary in the national interest; hereby vests in the Alien Property Custodian the property hereinbefore described in sub-paragraph 6, to be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.”

I believe that is the sense of it.

The Court: Do you have a copy of that document?

Mr. de Lorimier: He has a copy.

The Court: That may be admitted and marked in evidence.

The Clerk: Intervening Plaintiff's Exhibit I-1.

(Whereupon the vesting order No. 256, above referred to, marked Intervening Plaintiff's Exhibit I-1, was received in evidence.)

Mr. de Lorimier: Well, no, it is mine.

The Court: It is in evidence now. You ought to have a copy of it here.

Mr. de Lorimier: I gave Mr. Glicksberg a copy. I think I have a copy in the office, as far as that goes.

I believe that is about all at this moment, your Honor.

The rest that I have in mind is, I guess, more or less argument which I will better reserve until later.

Mr. Saroyan: With the Court's permission I ask leave to reopen the case on the part of the Superintendent at this time as a result of some item that Mr. de Lorimier just got through reading, and demand from the trustee a copy of the letter dated June 4, 1943, signed "Y. Taoko," Manager of NYK, in which he [320] states that the funds in question belong to the Japanese Government. Will you furnish the Court with a copy of that letter?

Mr. Glicksberg: We have no such letter.

Mr. Saroyan: You don't have such a letter?

Mr. Glicksberg: No.

The Court: You have a copy?

Mr. Saroyan: No, I don't, your Honor. That was just brought to my attention in this letter of instruction Mr. de Lorimier has from Washington where there is an existing letter dated June 4, 1943,

and signed "Taoko", and it is our understanding is the Manager of NYK.

Mr. Glicksberg: He was the manager, certainly he was.

Mr. Saroyan: In which it is stated——

Mr. Glicksberg: What is the date of the letter?

Mr. Saroyan: June 4, 1943, in which it was stated that the funds in question belong to the Japanese Government.

Mr. Glicksberg: For the record, your Honor, please, I would like to have my objection, the witness is reading something, you have to identify what you are wanting, a letter addressed to whom?

Mr. Saroyan: I don't know.

Mr. Glicksberg: We are going to object to any reference or indication or any mention in the record here as to any letter unless it is identified. [321]

The Court: I have a suggestion to offer. If it is available, produce it; if not, we will have to do the best we can without it.

Mr. de Lorimier: I will try to find that letter, copy of it, your Honor. If I can find a copy of it, and maybe you have it, and maybe Mr. Glicksberg.

Mr. Glicksberg: I don't have it.

The Court: With the understanding that may be produced if it is available.

Mr. Saroyan: If it is available.

Mr. Glicksberg: If your Honor please, that is the testimony adduced by the plaintiff in intervention, the United States Government. I don't know, Mr. de Lorimier, whether you want to incorporate

any part of Mr. Saroyan's testimony as part of your case in chief. I have no objection.

Mr. de Lorimier: I have been incorporating it by objecting to your——

Mr. Glicksberg: I know, but I am talking about your case in chief.

Mr. Saroyan: Mr. de Lorimier, can it be stipulated that all of the evidence produced by the defendant Superintendent of Banks applies to the plaintiff in intervention?

Mr. de Lorimier: Yes.

Mr. Saroyan: Is that the stipulation?

Mr. Glicksberg: If you have the stipulation I want my [322] objection, it is entirely inadmissible, immaterial and irrelevant.

Mr. de Lorimier: I will tell you so far as——

Mr. Glicksberg: For the record——

Mr. de Lorimier: I'll stipulate with Mr. Saroyan that—I read that telegram to you twice—that we are supposed to cooperate with Mr. Saroyan with regard to this matter and I will stipulate so far as I am concerned that Mr. Saroyan has put in here, we will cooperate with.

Mr. Saroyan: You mean, confirm it to be testimony of the Government on the complaint in intervention?

Mr. de Lorimier: That is right.

Mr. Glicksberg: Let me have an objection to every bit of testimony that has been introduced by Mr. Saroyan, that it is entirely immaterial, irrelevant and not within the issues of the complaint of intervention, just for the record.

Mr. Saroyan: Submit, your Honor, all the evidence is material as far as the defendant, the Superintendent of Banks is concerned, to the original complaint, and also material as far as the complaint in intervention is concerned.

The Court: I have proceeded on that thought myself. Aside from this, I thought that making up the record would take care of the rights and interests of all the parties in the [323] pleadings.

Mr. Glicksberg: Then for the record, may I have a stipulation between Mr. de Lorimier and Mr. Saroyan, that all of the testimony which has been introduced by the plaintiff in chief may be reintroduced as a defense and also by way of cross-complaint to the complaint in intervention of the plaintiff without the necessity of going back all over it again?

Mr. Saroyan: Counsel is seeking a similar stipulation from us?

Mr. Glicksberg: Isn't that the understanding you get by——

Mr. de Lorimier: No.

Mr. Glicksberg: You are not the cross-complainant, it is Mr. Saroyan.

The Court: All the evidence in the record is introduced and considered by the Court, all the exhibits involved by all the parties in interest.

Mr. Saroyan: That is right.

Mr. de Lorimier: I am willing to stipulate, so far as that is concerned, that the evidence that Mr. Saroyan has introduced we will agree to, because that was—those were my instructions from Wash-

ington, that it is our idea that this money belongs to——

Mr. Glicksberg: I am going to move to strike the last portion.

Mr. de Lorimier: Well,——

The Court: Wait a minute. [324]

Mr. Glicksberg: That is a matter your Honor will have to determine.

The Court: All right, it is a matter for the Court to act upon.

Mr. Glicksberg: By way of further defense and by way of rebuttal, I would like to introduce, if Your Honor please, the original license of the Treasury Department issued to Sterling Carr as the Trustee of NYK in November, 1942, to continue the bankruptcy under the freezing act administering the affairs of the alien NYK.

The Court: May be admitted and marked in evidence in order.

The Clerk: Plaintiff's Exhibit 30 admitted and filed in evidence.

(Whereupon the license above referred to dated November 28, 1942, marked Plaintiff's Exhibit 30, was received in evidence.)

Mr. Glicksberg: If your Honor please, Mr. de Lorimier has introduced a vesting order of the Alien Property Custodian, vesting the account of Yoshio Muto after receiving a license by [325] Sterling Carr as a Trustee of the NYK, to proceed with administering the Estate, November 18, 1942. The Alien Property Custodian has issued its vesting

orders, vesting itself of any surpluses in the NYK after its administration by bankruptcy.

And I have here the vesting order which I would like to read a portion of, particularly finding that the——

The Court: May be admitted and marked.

The Clerk: Plaintiff's Exhibit 31 admitted and filed in evidence.

(Whereupon vesting order No. 371, dated November 18, 1942, marked Plaintiff's Exhibit No. 31, was received in evidence.)

The Court: You want to read a portion of it; don't forget to do so.

Mr. Glicksberg: This is Vesting Order 371.

"Re: Nippon Yusen Kaisya.

"Under authority of the Trading with the Enemy Act,"—goes on about the trading with the enemy Act, I am coming down to paragraph 4.

"4. Finding that the liquidation of NYK, or of all of its American branches, is in the process of administration by Sterling Carr, as Trustee in Bankruptcy, acting under the judicial supervision of the United States District Court for the Northern District of [326] California, Southern Division;"

And: "Finding that the property described as follows:

"All rights and claims of NYK, (including but not limited to those of each and all of its American branches) in and to all property within the United States now held by the aforesaid Trustee in Bank-

ruptcy, or to which said Trustee in Bankruptcy may be entitled,

“is an interest in the aforesaid business enterprise * * *” Goes on to vest itself with the balance——

The Court: Is that limited to the assets we are discussing here?

Mr. Glicksberg: Yes. In other words, this——

The Court: Don't go beyond it?

Mr. Glicksberg: No. If there is any surplus in the bankruptcy, it goes to the alien property custodian after the creditors have been paid 100 on the dollar. The Alien Property Custodian has vested itself in the bankruptcy proceeding.

So long as Mr. Saroyan has read a portion of this letter wherein Mr. Glicksberg's name was mentioned and also where Mr. Saroyan seems to take it of personal issue, I would like to read all of it. This is a letter of June 27, 1949, comes from the office of Alien Property Custodian, the Assistant Attorney General, the Director. Reads as follows:

“Dear Mr. Glicksberg: [327]

“In your letter of June 7, 1949 you inquire whether, if it is our desire that the Yoshio Muto matter go to trial, we would be willing to stipulate to the introduction of photostatic copies of various documents obtained by you in Japan and sent to us with your letter of January 10th.

“Unfortunately, we do not feel able to concede, from the document submitted to us alone, that the Yoshio Muto account is the property of Nippon Yusen Kaisya, rather than that of the Japanese Consul. We therefore do desire that this question

of ownership be tried by the United States District Court in Civil Action No. 22509-S.

“Whether the photostatic copies of documents obtained by you in Japan should be introduced by stipulation in this litigation, or whether depositions should be taken in Japan, is a question which we feel should be decided by Mr. S. M. Saroyan, the attorney for Mr. Maurice Sparling, the Superintendent of Banks of the State of California, and the liquidator of Yokohama Specie Bank, Ltd., San Francisco Office, who will defend the action.

“In the event that you succeed in this litigation in establishing Nippon Yusen Kaisya's ownership of the Muto account, this office will take the position that the Muto account should be treated similarly to Nippon Yusen Kaisya's other accounts with Yokohama Specie Bank, heretofore held to be governed by vesting Order No. 371, [328] and we will therefore approve payment to the trustee of any liquidating dividends declared thereon. This position is based upon the theory that since Vesting Order No. 256 was issued after the Bankruptcy proceeding was instituted and the trustee appointed, the right, title, interest and claim of Nippon, Yusen Kaisya which was vested was only an interest in the excess proceeds or surplus remaining after the payment of creditors.

“In your letter of June 7th you also call our attention to your letter of February 18th, in which you referred to the claim of the Trustee of Nippon Yusen Kaisya, pending with the office of Alien Property, for ‘moneys deposited in Japanese banks

in the United States standing in the names of various Japanese Consul's special accounts, totaling \$122,100.00.' Inasmuch as these represent administrative claims asserted in respect to the Yokohama Specie Bank and/or the Imperial Japanese Government they must await resolution of all administrative claims asserted against these debtors."

That has nothing to do with the particular case.

I think that the plaintiff's rebuttal evidence on cross-complaint to the complaint in intervention.

Mr. Saroyan: That is all that the defendant Superintendent has at this time. Does your Honor wish argument in this case, some time next week?

The Court: Whatever you wish, gentlemen. What is your wish?

Mr. Glicksberg: Are you going to proceed to brief it? If after argument you want is briefed, I suggest we might just as well start out with the briefs and if your Honor requires oral argument we can do that. I think that is the better procedure. I often find myself in this position: If we argue—with Mr. Saroyan, then after the course of argument he then wants time to prepare a brief, and it delays it another month, so we might just as well have the brief first.

Mr. Saroyan: Mr. Glicksberg is always picking on me here.

The Court: I think you get along very well together.

Mr. Glicksberg: Today we have.

Mr. Saroyan: Willing to comply with your Honor's wishes. If your Honor wishes oral argu-

ment I am ready to argue orally. If you want us to waive oral argument and file our briefs——

Mr. Glicksberg: Are you going to ask the Court to file the brief ultimately after the oral argument? Then I suggest we go ahead with the briefing. Or waive briefing them and have oral argument and dispense with the necessity of briefing, and proceed with the oral argument. It is up to you.

Mr. Saroyan: Would your Honor want us to argue the facts and then file a memorandum on the law?

The Court: I never want anything. I am here to serve, [330] whatever you agree upon to do. I am at your service.

Mr. Saroyan: Well, as far as the facts are concerned, I think there are some items that should be brought to your Honor's attention in order to tie the thing together. And for that reason I suggest, as far as the Superintendent is concerned, we should be given an opportunity to limit our arguments, say to 20 minutes on each side, and then file a memorandum as far as the law is concerned.

Mr. Glicksberg: If that is what——

The Court: I think the best I can answer to that suggestion—you want oral argument, I will give you an opportunity. I think it will be well to brief your material and then you can have 20 minutes, or whatever time you wish.

Mr. Saroyan: You mean after the matter has been briefed?

The Court: How soon will you be able to submit

the first brief? Is the transcript going to be written up?

Mr. Glicksberg: I don't know if we can afford it, I don't know whether the Trustee in Bankruptcy can afford it. I am not saying that facetiously, your Honor please, I mean it. I think if the matter naturally goes adversely to the Trustee in Bankruptcy and an appeal is necessary, then the transcript would have to be written up. I assume you would take the position, you would take an appeal, and if he wants to split the cost of the transcript and have it written up——

Mr. Saroyan: Well, I think the Government might have something [331] to say about that, too. For that reason, is it necessary to decide that matter at this time?

The Court: Yes, so simple a matter that I won't have any trouble deciding it, if you won't.

Mr. de Lorimier: I think the Government will be willing to pay their share of the expense.

The Court: Somebody is going to be disappointed in this case, and I suggest that you split your costs of part of the transcript so that whoever may be disappointed will go forward.

Mr. Saroyan: Very well, your Honor.

The Court: Not running a perfect operation here, being human—I call it human—somebody will be disappointed and I don't want it to be heard to say they haven't been in court and had an opportunity to be heard, unless you have some suggestions to offer.

Mr. Glicksberg: No, delighted only to pay one-third.

Mr. Saroyan: We will be delighted—we will pay one-third.

Mr. de Lorimier: I think the Government is willing to pay a third.

The Court: Since you are going to be taken care of, Mr. Reporter, you may make a copy for me.

Mr. Saroyan: And your Honor directed a question to me as to how much time I would want to file a brief. Isn't it customary to have the plaintiff file his brief first? [332]

The Court: Certainly.

Mr. Saroyan: That would be Mr. Glicksberg.

Mr. Glicksberg: We have two plaintiffs here.

Mr. de Lorimier: Well, I am not the plaintiff.

Mr. Glicksberg: Plaintiff in intervention.

Mr. de Lorimier: Plaintiff in intervention.

The Court: Well, I will give you the opening and closing that would take care of you.

Mr. Saroyan: Your Honor suggests that we wait the transcript so the briefs can be——

The Court: With your capacity you won't need to wait for the transcript and then file the first brief so that anything you overlooked will be taken care of in your closing brief.

Mr. Glicksberg: Thank you. I hope I won't overlook anything.

The Court: Anything else?

Mr. Glicksberg: How much time?

Mr. Saroyan: That is your question.

Mr. Glicksberg: I can get mine in 15 if you take only 15. If you take 30——

The Court: After you get a transcript you will have no difficulty not overlooking anything.

Mr. Glicksberg: I hope not.

The Court: Very well.

Mr. Glicksberg: Twenty and twenty and ten?

Mr. Saroyan: Twenty, twenty and ten.

Mr. Glicksberg: If that meets with your Honor's approval.

Mr. Saroyan: I think that sounds reasonable; twenty, twenty and ten.

The Clerk: That will be about June 21 for submission. That gives the reporter ten days.

The Court: Very well. Is there anything else?

Mr. Glicksberg: Not at this moment. Thank you very much.

(Whereupon the above entitled matter was closed.) [333-A]

PROCEEDINGS ON ARGUMENT

Wednesday, July 25, 1951

The Court: Proceed, gentlemen.

The Clerk: Carr versus Yokohama Specie Bank, further hearing. Will counsel state their appearances for the record, please?

Mr. Glicksberg: Mr. Glicksberg for plaintiff Sterling Carr.

Mr. Saroyan: S. M. Saroyan for the Superintendent of Banks, Maurice C. Sparling.

Mr. Barshay: Percy Barshay for the Attorney General of the United States.

Mr. Saroyan: Do you want to hear us in turn, Your Honor?

The Court: I am indifferent in the matter of how I hear you, gentlemen. Proceed.

Mr. Glicksberg: I am satisfied, as far as Sterling Carr, plaintiff, as I indicated at the calling of the calendar this morning, with the state of the record. We have nothing further to add other than that which we have set forth in the brief, and even though Your Honor would be patient with the brief, we are willing to waive oral argument. Now if counsel wishes, it is his privilege.

Mr. Saroyan: If Your Honor please, I was in the east on some business and when this matter came up, as I understood it, you wanted an argument, or it was communciated to me that there would be argument. I don't want to make a misstatement to the Court. [2]

The Court: I am afraid you are, for I don't recall of any case where, after a brief was submitted and you had a full opportunity to indicate your theory of the case on both sides—I don't recall inviting any argument of any kind.

Mr. Saroyan: Well, you might have said something that you wanted to hear from the Government on it.

The Court: Well, it is a woeful thing to look back at.

Mr. Saroyan: Well, I prepared a forty minute argument, and I am going to boil it down to five minutes.

The Court: Proceed.

Mr. Saroyan: Hear we go. If Your Honor please, there's about four points that I wish to call to the Court's attention in the five minutes allotted me, and that is this. I am not going to go over the facts at all, but just sum up the highlights.

The \$39,000 that originally came over here came here from Japan. We contend from the verified applications filed that that money belonged to the Japanese Imperial Government. It came here to the Yokohama Bank and was deposited in the name of Yoshio Muto, as a representative of the Japanese Government. Irrespective of the fact whether that money belonged to the Government or belonged to NYK, there has been absolutely no wrong, no fraud of any kind, no breach of expectancy or any word that you want to use, been committed against the creditors of NYK, because that money was never reachable to them as [3] assets. If they were to take advantage of that money, it would be by wind-fall now, Number 1.

Number 2, the \$69,000 that was collected in San Francisco, Seattle and Portland for passage fares, tickets sold for the boat, Tatuta Maru, or whatever the name is—that was going to go back to Japan; that boat was a Japanese requisitioned ship. It was understood by everybody who bought a ticket to that boat and it was understood by the trade that the Imperial Government of Japan had chartered or requisitioned that boat and owned that boat and was selling passage for that purpose. How can it be argued that the creditors of NYK are being de-

prived of that money, \$69,000, when at no time did they ever expect that they would be able to reach that money in the form of an attachment or an execution, if it became necessary to do so.

Number 3, NYK during the month of October filed an application before the Treasury Department under oath. In that application they asked for permission to be paid the sum of some \$4700 as an agency fee, where they represented as an agent the government of Japan, the principal. They said that this fee was for them acting as agents for a boat that the Japanese government was operating between San Francisco and Yokohama. They said it was to cover all the necessary services that are usually rendered by an agent in the United States in the operation of such a boat. Now how can a principal be [4] paying itself an agency fee?

Number 4, Mr. Glicksberg, representing the trustee, has taken fifteen pages to call to Your Honor's attention why all of those documents which he has offered in evidence should be admitted in evidence, and why our motion to strike should be denied. He has not brought himself within the business records as evidence act, 28 U.S.C.A., because that act says that the entries must be made within a reasonable period of time when the business is conducted. Everyone of those documents were prepared within a year to seven years after the transaction actually took place. We submit that the action should be decided as against the plaintiff and for the government and the defendant Superintendent of Banks.

Mr. Barshay: If Your Honor please, I will re-

strict my argument to a point that was raised by Mr. Glicksberg in his reply brief to my answering brief. Your Honor may recall that in my answering brief I restricted myself to a discussion of the legal effect of an unlicensed transaction. That is to say, a transaction which was required to be licensed by the freezing order of June 10, 1940, issued by the President.

In my reply brief I cited, as what I regard to be conclusive authority, the case of *Proper versus Clark*, in which it was held in effect that an unlicensed transaction could not be given any legal effect. I argue that under that decision, since a transfer of funds by the Yokohama Specie Bank [5] from Japan to its branch in San Francisco was not licensed, if NYK had a beneficial interest in the funds, that Mr. Glicksberg's argument that he was entitled to have a judicial decision from Your Honor, subject to a subsequent license, could not hold water. Mr. Glicksberg, in reply, argued that the facts of this case fitted into a subsequent decision of the United States Supreme Court in *Lyon against Singer*, and what I would like to point out to Your Honor is the distinction between these two cases. For that purpose, if I may, I would like to take just a moment to explain the basic facts in the *Proper* case.

The *Proper* case arose in New York. Plaintiff in that case was a statutory receiver appointed by a New York State court under a New York statute governing the liquidation of foreign corporations doing business in New York, who ceased to do busi-

ness in New York. The New York statute provided that a receiver might be appointed of all the assets of such a corporation for the benefit of domestic creditors of the corporation.

The Court: State court?

Mr. Barshay: That's right, a State court receiver. Such a receiver was appointed for an Austrian corporation, or an Austrian association which has a very long German name, but it is known as A.K.M.

Under the statute, the initial step was to appoint a [6] temporary receiver, and Proper was appointed such a temporary receiver. He was appointed on June 12, 1941, and it happened that June 12th was exactly two days before the freezing order was issued. Therefore, on June 12, 1941, he was a temporary receiver. In September of 1941, several months after the freezing order went into effect, his appointment as permanent receiver was confirmed. As such receiver, he claimed that he was entitled to collect a debt which A.K.M.—which A.S.C.A.P. owed to A.K.M. Subsequently the Alien Property Custodian vested that debt, and in this case the question arose whether or not Mr. Proper, as receiver of A.K.M., was entitled to collect the debt, or whether the Alien Property Custodian was entitled to collect the debt. The question turned on the effect of the freezing order. The reason it turned on the effect of the freezing order was because under New York Law, as viewed by the United States Supreme Court, Mr. Proper by virtue of his appointment as temporary receiver on June

12, 1941, prior to the issuance of the freezing order,—

The Court: Two days before.

Mr. Barshay: Two days before,—did not acquire title to the assets of A.K.M. If the freezing order had not intervened, he would have acquired title to the assets by virtue of his appointment in September of 1941, when his appointment as permanent receiver was confirmed by the New York State court.

On behalf of Mr. Proper it was argued that the freezing [7] order was not intended to cover transfers of title by judicial action. Thus the United States Supreme Court held to the contrary; it held in favor of the Alien Property Custodian, holding that the freezing order had the effect of requiring Mr. Proper to obtain a license before he was appointed permanent receiver in September of 1941.

As I understand it and as I believe the Supreme Court intended it, the holding of the court is that any transaction which violates the freezing order cannot be given any legal effect.

After that case was decided, a series of other cases arose, also touching on the question of whether unlicensed judicial action fell within the scope of the freezing order. Cases arose involving state court attachment proceedings, where attachments were issued without license after the freezing order was in effect. A case arose, the case of Lyon against Singer, also in New York, in which the question of whether or not a claim for a preferred claim in a State court proceeding was required to be licensed under the freezing regulations.

In *Lyon against Singer*, the United States Supreme Court held that such a claim to a preferred claim was not required to be licensed, that it was not within the scope of the freezing order. However, if you examine into the facts which were involved in *Lyon against Singer* and compare them to the facts involved in *Proper against Clark*, you find this basis difference, [8] that in the *Proper* case there was an attempted transfer by judicial action, which was not licensed. In the *Singer* case the Supreme Court held that the attempt to get a preference was not equivalent to a transfer of title; it was simply a claim to reach the funds first as preferred creditors rather than an assertion that the creditors were claiming title to the assets of the debtor. The Supreme Court said in so many words that their decision in the *Proper* case did not require them to reach the conclusion that a license was required in *Lyon against Singer*. So the two cases are distinguishable upon the facts and distinguishable upon the effect which the Supreme Court gave to those facts under the freezing regulations.

Now Mr. Glicksberg contends that our case falls within the rule of *Lyon against Singer*. I contend that it falls from the rule of *Proper against Clark*. Now if I may take a few minutes, I would like to demonstrate the similarity between our case and *Proper against Clark*.

In our case, Your Honor will recall, the two sets of circumstances are involved: first, in October of 1941, after the freezing order went into effect, the

Yokohama Specie Bank transferred from Japan the sum of \$39,000 to the Yokohama Specie Bank in San Francisco. On the surface, that transaction was one for the benefit of Consul-General Muto, or the Japanese government. No mention was made of NYK [9] Mr. Glicksberg contends that, in effect, what the Yokohama Specie Bank was doing, with the knowledge of the Japanese government, was transferring funds which really belonged to the NYK. So he is saying that when Yokohama in Japan transferred the funds to Yokohama in San Francisco, it was transferring funds which belonged unofficially to NYK. If that is so, then I say that transfer of a bank credit was made without a license, and Mr. Glicksberg, I feel sure, agrees that no license was granted. I say that if it was made without a license, then it was a transfer which can be given no legal effect under *Proper against Clark*. In other words, that NYK is not in a position to assert, because it failed to get a license, that it has title to these funds; because the transfer was made, as I say, without a license from the Secretary of the Treasury. Therefore the case is like *Proper against Clark*.

The second circumstance which Your Honor will recall, which gave rise to this deposit which is now in dispute, are the checks made from the passengers who ultimately returned to Japan on the *Tatuta Maru*. Your Honor will recall that the record shows that NYK, as agent for the Japanese government, collected fares from these passengers and deposited them in the Muto account. That deposit, in other

words—the payment of those monies to Yokohama Specie in San Francisco—was a payment which was prohibited by the freezing order until it was licensed. If, as Mr. Glicksberg contends, those fares [10] were monies collected for the benefit of NYK, then the deposit in the blocked account of Muto was made without a license, and I think Mr. Glicksberg would agree. And again I say, under the doctrine of *Proper* versus *Clark*, NYK is not in a position to assert that it has title to those funds, because it can only assert that it has title if it had a license.

In *Lyon* against *Singer*, the question did not arise in the subject matter of the suit, which were the general assets of, I believe, an Iranian bank doing business in New York. There was no question there as to who owned those assets initially. They weren't affected by the freezing order at all; they were assets which were created long before the freezing order went into effect. The question there was whether, by judicial action, certain creditors of the bank could get a preference in those funds. And that, the Supreme Court said, was not prohibited by the freezing order.

So my conclusion is that, under the doctrine of *Proper* against *Clark*, NYK is not, as I say, in a position to assert title to these funds, since it did not procure a license from the Secretary of the Treasury. And if it has no title to these funds, then it follows as a matter of course that the trustee in bankruptcy, who predicates his claim to these funds on the theory that NYK had beneficial ownership

of these funds, has no title either. Therefore the action should be dismissed. [11]

Mr. Glicksberg: In reply to Mr. Barshay, if Your Honor please, I don't want to burden Your Honor with repeating the argument in our brief. We are not avoiding *Proper versus Clark*. In fact, we are coming within *Proper versus Clark* under our theory, and we are only calling Your Honor's attention to a subsequent case, the case of *Lyon versus Singer*, just to show the affirmation of the same principle that *Proper versus Clark* law has set; to wit, there was a condition, by judicial determination, of a passing of title without the securing of a license.

The period when you secure your license is a condition precedent to obtaining the actual fund. Our whole theory of the case is in conformity with the basic principles of *Proper versus Clark*; in other words, I set forth on page 1340, quoting from the case:

"It is true that state litigation between local claimants and foreign powers, or those in possession of blocked or frozen assets, could proceed to a determination of rights between the claimant foreign nationals without the blocked property passing into hands that might use it for the detriment of the welfare of this nation, as long as payment could not be made without a license."

In order to clarify all of it and highlight it, I would just like to present to Your Honor a passing subject, something [12] along this line. Now let us assume, instead of having the Alien Property Cus-

todian here, that we had another Japanese here as the defendant. The plaintiff comes in and has, as between the plaintiff and defendant, just asked this court for a determination of the respective rights between the parties—the legal rights—, admitting to this court that before you actually can receive that res, if this court should determine the respective rights between the two parties are in favor of the plaintiff, a license must be obtained. On the other hand, Mr. Barshay attempts to state to this court that where two people—one having, presumably, a beneficial interest and another person having the legal indication of ownership—bring property into the United States under a license and it comes in here under a license, if subsequently the two people have a falling out between themselves, that the beneficial person cannot come before this court or before another court and ask for a determination of those respective rights between the beneficial person and the person whom the United States authorized to bring the funds in here by giving them the license. That is the basic distinction between the case that we have here. The money came in, and when Mr. Saroyan says the \$39,000 came from the Japanese government, he has to look at the facts behind it.

If Your Honor is going to admit the evidence, the evidence conclusively shows that it wasn't the Japanese government that [13] filed a petition in Japan for transfer, but it was the NYK in Japan that filed its petition with a Japanese ministry, the Japanese Ministry of Finance, and secured the right

to transfer these funds to the Yokohama Specie Bank in Tokyo for transfer here. In other words, we have funds coming in the United States belonging to one person but standing in the name of another person—all with the consent of the United States Government, with the consent of the Treasury Department, with the consent of the State Department. Under those facts, a year, or two or three years later, the creditors come before this court and state to this court, forgetting that the Alien Property Custodian is the United States Government,—. As a matter of fact, if the suit had been filed in a state court instead of in the federal court, the case would fall directly under the legal language of *Proper versus Clark*, that we can proceed in any jurisdiction. Once money lawfully come into the United States, mind you, Your Honor, we are proceeding under a legal question, a resulting trust; to wit, where res is given and an obligation is admitted by the recipient in the United States, and all we are asking is that this court determine the respective legal rights as between the Alien Property Custodian, or the Empire of Japan, for the Alien Property Custodian can stand in no better position than the Empire of Japan as against the creditors represented by Sterling Carr, the trustee. We maintain that we come exactly within the [14] *Proper* case, that the facts are in accordance with the legal principles with respect to a resulting trust; and whether it be records admitted today or whether it be admitted by way of business records or admissions against interest, the evidence which we have presented to this court is admissible

to show that the Empire of Japan—and that is the Alien Property Custodian at the present time—concedes and admits that the money is the money of NYK. As such, we are only asking this court for a determination, with the understanding and knowledge that if the determination is in favor of the creditors of the United States, they would then have to proceed to the Treasury Department and secure a license for the transfer of that particular fund. We submit under the evidence which we have presented here, there can be no other conclusion. We hope, I should say, there can be no other conclusion as against the Empire of Japan and that the funds should be awarded, subject to securing a license, to the creditors of the NYK.

The Court: Would you outline the form of a judgment for the purpose of the record right now? What form of judgment, in the event the Court determines you should prevail in this case?

Mr. Glicksberg: A similar judgment as was given in the Lyons case, that the plaintiff may have judgment against the Alien Property Custodian subject to securing a Treasury license in conformity with the freezing order, that particular section. [15] We are only asking for a determination as between the Empire of Japan and the creditors of the NYK, as to who is entitled to that money, if and when we are successful in securing a license. Your Honor, just as in the Lyons case and in the New York cases, would make that order subject to the securing of a license. If we are unsuccessful in securing a license, we can never receive the proceeds from the fund.

The Court: What is your interpretation of the answer that counsel on the other side will give us to this license that we are discussing?

Mr. Glicksberg: We stay within the Proper case. We fall exactly in the language of the Proper case. Just as I have read to Your Honor the Proper case, it says that litigants can proceed in any competent jurisdiction to have their respective rights determined between themselves, subject to securing a license from the Treasury Department at the time proper application is made. In other words, the securing of a license has nothing to do with the respective rights between the particular parties, because this fund came in here with a license. It came in here with the consent of the State Department, with the consent of the Treasury Department; and a license was granted. We cannot state at this particular time that if the Treasury Department or the United States Department did not consent to this, that if the NYK filed a petition for such a license, that it would not have received such a license. There [16] was no need of acting upon a duplicate license, and that is the only reason why one license was given to Yoshio Muto. As stated in our brief on reply, I can't impress too much upon Your Honor that there is no distinction between our particular case and the legal language of the Proper case, or the subsequent Lyon case. We are only asking for a determination as between two particular persons; mind you, Your Honor, neither has any better privilege from this court than the other. The mere fact that the Alien Property Cus-

todian is a branch of the United States Government gives it no greater rights than the Empire of Japan has.

Now the Empire of Japan brought the money under its name, factually, and the Empire of Japan had a license under the name of Yoshio Muto, and that is where the funds are at the present time. We are not asking this court to circumvent the Proper decision. We are not asking this court to give a decision in favor of the plaintiff without the necessity of a license, which would be actually giving effect to a judicial determination, to title by judicial process. No. If we are successful, we are only going to ask this court to give a conditional judgment in favor of the plaintiff, based upon its securing a license. If it can't secure the license, at least the court has determined the respective rights on legal questions between the two principals. Otherwise, it deprives the creditors of their day in court; because there is no other way that we can attempt [17] to reach this fund on the resulting trust which the Empire of Japan (not the Alien Property Custodian, but the Empire of Japan) concedes belongs to the NYK.

If the evidence can be admissible—if Your Honor admits the evidence—then it is undisputed, uncontradicted; on three different occasions the Empire of Japan has admitted and stated from the evidence that these are funds of the NYK and will be turned over to the respective agencies of the NYK.

The Court: What does the record show in that respect?

Mr. Glicksberg: In the deposition, under the evidence as 20A, B and C, it specifically shows that. I would like to read it. I don't want to take Your Honor's time, but——

The Court: Well, we have some time, and I don't mind giving you gentlemen the benefit of my present knowledge, which is anything can happen here. So you can put all of the energy either side may possess forward. I haven't made up my mind on this case. I am going to be frank with you.

Mr. Glicksberg: I am reading from Exhibit D of Mr. Hiroyoshi, paragraph 1.

The Court: Dated?

Mr. Glicksberg: Dated November 26, 1943. It is a letter from the ministry of foreign affairs, director of political affairs bureau, and addressed to the president of the Nippon Yusen Kaisya, Inc., and I am only reading from paragraph 1. [18] I will refrain from the preliminaries:

“Of the funds in question, those that are frozen at the various places involved are to be returned at the end of the war by some method, such as transferring the account from the special account of the ministry of foreign affairs offices abroad to the account of your branch offices in various places involved.”

In other words, the fund which is in San Francisco would go to the San Francisco. The fund in Honolulu—there were three ships—would go to the Honolulu branch. The fund in Seattle would likewise go to the NYK in Seattle.

Likewise, the admission in September 6, 1948,

where there is still a controversy going on on account of the frozen accounts. The first page, on September 6th, of the translation of Exhibit F, goes on to say—in other words, the amount on hand shall not be governed by the war indemnity special measures of Japan, and essentially it shall be taken in consideration in connection with the disposition of the overseas assets as part of the balance of the special account of the consulates in “which your company’s funds” . . . Details are set as per the attached letter from the accountant’s bureau. In other words, there is an additional admission as we go on with the attachment thereto by the foreign affairs ministry, the Treasury Department, stating again in 1948 that these are the funds of NYK and are to be returned to the [19] NYK.

Now beyond that the legal questions are only the basic preliminary questions of resultant trust. Just as if we had the situation of A giving to B various sums of money which are subsequently placed, and then not returned. There is no question of fraud. If there is any fraud, it would be by virtue of the failure of the United States Government notifying the press, and the public at large, that they were not using Japanese requisitioned vessels and terming it merely as a guise. But from the first exhibit, which was introduced here, that was the course of conduct which was agreed between the United States Government and the Empire of Japan. We know no other way, if Your Honor please—and I state that again sincerely—

The Court: I am satisfied you did, or you wouldn't be here.

Mr. Glicksberg: That is the only way we can reach this. If it goes to the Empire of Japan, which goes then to the Alien Property Custodian——

The Court: I am in doubt about whether you can reach it under your theory of your case.

Mr. Glicksberg: Well, that may be so. That is for Your Honor to determine. All I can do is the best I can.

The Court: I admire your energy and your resourcefulness.

Mr. Glicksberg: Thank you. [20]

The Court: Not only in this case but in other cases.

Mr. Glicksberg: Thank you, Your Honor.

The Court: Whether I agree with you or not is beside the point.

Mr. Glicksberg: Well, Your Honor hasn't agreed with me on numerous occasions; on others you have. But all we can do is the best we can, and I sincerely state, any attempt to state that because of the failure to secure a license forestalls and makes it a condition precedent before a determination of the rights between two persons, is contrary to the Proper case and contrary to all the decisions which the Supreme Court has decided following the Proper case.

The Court: What is the language in the stay order, the substance of this freeze order? What is the language?

Mr. Barshay: I have it. May I read it to Your Honor?

The Court: Well, maybe counsel has it there. Your may read it if he hasn't.

Mr. Barshay: I have it here.

Mr. Glicksberg: No, I have no objection—it is submitted?

Mr. Barshay: Oh, no, no. I just wanted to give you the language.

The Court: The language of the order.

Mr. Glicksberg: The freeze order says certain things are unlawful. It says all transfers of credit between any banking institution within the United States and all transfers of [21] credit between any banking institution within the United States and any banking institution outside of the United States, without a license. But here we have a license. We, the NYK does not have a license, and the NYK is not transmitting these funds. The funds are being transmitted by the Empire of Japan under a license.

The license is before this court. The money actually is in here legally with the license. The mere fact that counsel says, just because now under a resulting trust the creditors of the NYK say that we have a beneficial interest,—that is only the result of a legal, lawful transaction and not a transaction in which the NYK was a fraudulent actor. All of the creditors—. Or, the creditors were fraudulent actors. There was no fraud here at all. There was an expediency, a method of bringing it in which the United States Government, the Treasury

Department and the State Department agrees with the Empire of Japan. And that is why, to me, it becomes so extremely important, contrary to Mr. Saroyan, that all of the facts that happened in Japan before the money came over here should be placed before Your Honor as to the course of conduct. In other words, the license to clear from Japan, the application was made by the Yokohama Specie Bank in the name of the Empire of Japan. The only purpose of that is to show the whole trend and place all of the facts here to show the entire transaction from the beginning to the end. Not because [22] the NYK could not have received the license; we can't say that at all. Once a license was granted to one person, naturally Your Honor has before you an application by the NYK for another license, which was then returned and on the face of it says, "By the Treasury Department," "there is no need for you to have a license because Yoshio Muto has been licensed." Therefore, the Treasury Department and everybody else knew all about this transaction, and it is not a case where we have a beneficial right in the name of somebody else being brought in here, by attempting to avoid the bringing of a license, which would bring into being the basic inhibitions of this freezing order. You have one license, and you don't require four or five more. Once the money comes in here, then it is for this court or any state court to make a determination if anybody claims any right to that money, by way of resulting trust or by way of oral agreement. Then it becomes for the moving party, if it is a success-

ful party, an obligation, a condition precedent, to comply with the Proper case. And to comply with the ruling of the Lyons case to get a license.

In other words, Your Honor, I would like to read you the ruling of the Supreme Court in the Lyons case, which upholds the Proper case, and I am reading from page 904, section 1 or 2:

“Oral argument and study of the record has convinced us that the judgments of the New York Court of Appeals are not inconsistent with the first War Powers Act of [23] 1941, etcetera. We accept the New York court’s determination that under New York law these claims arise from transactions in New York and were entitled to a preference. Since the New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished. Our decision in the Proper versus Clark case, 377 U.S. 472, does not require a clear conclusion. . . .”

In other words, we are not asking—. We concede the Alien Property Custodian has a right to vest. We also concede the Alien Property Custodian has a right to demand a license from us before he turns it over. That we concede. No such result follows from the New York court’s judgment in the present cases. In other words, if Your Honor should give judgment, see fit to give judgment to the plaintiff and make it conditional upon the licenses by the Alien Property Custodian we definitely would come within the Proper case and the Lyons case and all the other cases which follow. The Su-

preme Court in this case just affirmed the conditional judgment below.

Now we submit, if Your Honor please, there is no way to have our day in court for a determination of this right of the creditors here, and an attempt to bring it outside of the Proper case and to thwart the rights of the American creditors certainly would be an injustice merely by saying, You have no [24] right here as against the Empire of Japan—not the Alien Property Custodian. We concede the Alien Property Custodian requisitioned, planned to obtain a license. We are only asking for a determination of the rights of the NYK creditors as against the Empire of Japan. The mere fact that the Alien Property Custodian stands in that position makes no difference.

Well, if we are successful we will have to make our application to the Alien Property Custodian for our license. If we are unsuccessful, we never can obtain the actual fund, and we submit that all of the evidence that we have attempted to introduce, which is subject to Your Honor's motion to strike or the defendant's motion to strike, should be admitted into evidence as showing the entire course of conduct between the respective parties. By that I mean, the Empire of Japan—not the Alien Property Custodian. The Alien Property Custodian is only here in a representative capacity, and we submit judgment should be rendered for the creditors of the NYK.

Mr. Barshay: If Your Honor please, Mr. Glicksberg has argued or has stated to be a fact that the

transfer of the \$39,000 from Yokohama in Japan to Yokohama in San Francisco, or from Japan to the United States, was made with the full consent of everybody concerned, including the State Department and the Treasury Department. With all due deference to Mr. Glicksberg's recollection of the record, that simply isn't a fact, and the documentary evidence, I think, shows that. [25] He has stated that a license was obtained from the Secretary of the Treasury authorizing the transfer of these funds. But the license that was obtained authorized the transfer of funds in which the Japanese Government had an interest, not funds in which NYK had an interest. As a matter of fact, if it were disclosed that NYK had an interest, it is an open question whether a license would or would not have been granted. Nobody can say. That is a matter of speculation. The fact, however, is that the application for the license specifically stated that the applicant, who was the consul-general of Japan at San Francisco, represents and warrants that no party other than those mentioned in item B above,—and item B above mentioned is only the Imperial Government of Japan and not NYK—has any interest, direct or indirect, in the transaction or transactions for which a license is applied for herein. If there are any exceptions, note them below. And there is no notation below that NYK had any interest. And the license was granted upon that specific representation and so states.

So that it is a fact that no license was granted authorizing the transfer of these funds if NYK

had an interest in them, you see. And that is precisely my point. If the fact is as Mr. Glicksberg contends, that they were really beneficially NYK's funds, then I say the transfer of those funds from Japan to the United States was unlicensed. If they were [26] unlicensed under the Proper case, which Mr. Glicksberg now concedes is good law and not overruled by Lyons against Singer, under the Proper case no legal rights can flow from a transaction which violates the freezing order. The violation of the freezing order here was the failure to obtain a license. Therefore, NYK cannot, as I have said before, claim the equitable title, the beneficial title or the legal title to these funds; and Your Honor, in conformity with the Supreme Court's decision in the Proper case, has only one alternative. You cannot say that NYK has equitable or legal title to those funds, you must say in accordance with the Proper decision that NYK having failed to obtain a license, obtained no legal or equitable title to these funds. This court cannot find that it has legal title to these funds. And if it cannot find that NYK has legal title to these funds, it follows as a matter of course that these funds are not part of the bankrupt's estate.

Now part of the NYK's estate and the trustee in bankruptcy has no claim to them, and that is precisely my point. I should like to read, if I may, the full language of the executive order just to make it clear. I would like to read the actual text so far as it is pertinent. It says:

“All of the following transactions are prohibited,

except as specifically authorized by the Secretary of Treasury by means of regulations, rulings, instructions, licenses or otherwise: (f) (1) such transactions are by or on behalf of or pursuant to the direction of any foreign country designated in this order or any national thereof, or (2) such transactions as involve property in which any foreign country designated in this order or any national thereof has at any time on or since the effective date of this order had any interest of any nature whatsoever, direct or indirect, . . . all transfers of credit between any banking institutions within the United States and all transfers of credit between any banking institutions within the United States and any banking institution outside of the United States, including any principal, agent, home office, branch or correspondent outside of the United States of a banking institution within the United States."

My point is that this transfer between Yokohama in Japan and Yokohama in San Francisco falls within the precise language of this executive order which I have just read; that it was unlicensed and therefore cannot be given any legal effect, if it is true that NYK was beneficially interested in the fund. And that, I say, follows from the language of the Supreme Court in the Proper case.

Mr. Glicksberg: Well, the answer to that is, if Your [28] Honor will allow me, that the Proper case doesn't hold that, doesn't hold that no legal rights flow. That is where I disagree with counsel completely. No, the Proper case only holds that no judicial right, no right by judicial process, will follow without securing a license.

The Court: He wants an opportunity to secure a license.

Mr. Glicksberg. That's right.

Mr. Barshay: Well, may I say this on that point?

The Court: Yes.

Mr. Barshay: His application for a license must be made to the Attorney General—foreign funds control section of the Treasury Department was several years ago transferred out of the Treasury to our office, the office of the Attorney General.

Mr. Glicksberg: Well,—

Mr. Barshay. And his application would have to be made to the very defendant in this case.

Mr. Glicksberg: That's right, that's right; which is perfectly all right.

Mr. Barshay: He might have done it in the past.

The Court: Why didn't you do it?

Mr. Glicksberg: Why,—why didn't we do it? If we did, if Your Honor please, the petition would be denied on the ground that we have no rights to the fund because it stands in the name of Yoshio Muto. But if we are successful in [29] securing a judgment from a competent court and then we proceed to file our application before the Alien Property Custodian, then we have an opportunity to secure a license.

The Court: What is the language about the Attorney General there?

Mr. Barshay: Pardon?

The Court: The application must be made to the

Attorney General? Where did you get that language?

Mr. Barshay: Oh, I say the foreign fund control section, which heretofore granted licenses, as part of the Treasury Department, was several years ago transferred to the Justice Department and made a part of the office of Alien Property. So that Mr. Glicksberg's application would be made to the very office.

The Court: In case I have agreed with your view, what form of judgment would you have the court enter?

Mr. Barshay: Only judgment dismissing the action. That is all that would be necessary.

The Court: On what grounds?

Mr. Barshay: On the ground that I have already explained. May I just read a few words, since Mr. Glicksberg is so insistent that he falls within the language of the Proper case? May I just read a few words from page 486 of 337 U.S. in the Proper case?

“It is our conclusion that the joint resolution [30] of May 7, 1940, and the executive order of April 10, 1940 (which is the freezing order) put into effect a valid plan for the control of the property covered by the regulations that prohibit any change of title to that property by reason of the subsequent appointment of petitioner as a permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable.”

The Court: That is the language he depends upon.

Mr. Glicksberg: That is true.

Mr. Barshay: May I finish?

The Court: Oh, I beg your pardon, sir.

Mr. Barshay: There are two other points.

“We base our determination on the purpose of Congress to prevent ships in title to blocked assets and the prohibition of the executive order against transfers of such a credit as this.”

And there I am referring to the very language I read a few moments ago—transfers of credits between banking institutions, one, outside of the United States to one within the United States. The language of the order prevents, prohibits such. Mr. Glicksberg argues that it would be sufficient if he were to get a license, that at present all that is prevented and payment is—all he needs is a license for it. [31] But the Supreme Court says the language of the order prohibits more than payment, it prohibits transfers of credit. And we do not think the administrative holdings are to the contrary.

Mr. Glicksberg: We agree with that. Absolutely are in accord with it. If we don't get it from your Alien Property Custodian, if we have a judgment here, there are other courts where we then would recede.

Mr. Barshay: My final point is this, Your Honor. The case is now before you on the state of facts which are undeniable. No license was obtained. It is incumbent upon Your Honor to decide whether

in the face of the fact that no license was obtained, title to these funds, which were transferred in violation of the executive order from Japan to the United States, I vested equitably in NYK, as Mr. Glicksberg contends. I say they can't because under the Proper case Your Honor may not give effect to an unlicensed transfer of a banking credit such as occurred here. If Your Honor can't give credit or effect to it, rather, then the trustee in bankruptcy simply has no title which he claims derives from the fact that NYK——

The Court: You are almost as persuasive as Mr. Glicksberg.

Mr. Barshay: I realize this is quite technical, and if Your Honor would prefer, I could submit a memorandum. I don't——

The Court: Well, I don't see how you could add very much.

Mr. Barshay: Well, there are other cases which have been [32] decided very recently by the Supreme Court.

The Court: Recently?

Mr. Barshay: Yes. Within two months.

The Court: Have you them there?

Mr. Barshay: I have them in mimeographed form. They are not officially reported. They sustain my position by implication.

The Court: Any stronger case than you have presented?

Mr. Barshay: No, I wouldn't say so. But they sustain the validity of the Proper case as holding

that from an unlicensed transfer no legal consequences can flow.

Mr. Glicksberg: We agree with those cases.

The Court: He has no quarrel with this.

Mr. Glicksberg: No. But we say this is a licensed transaction.

Mr. Barshay: Well then, he must agree with my conclusions.

Mr. Glicksberg: Not necessarily. We don't agree that there can be no legal rights in a legal transfer fund, which came into the United States legally under a license.

Mr. Barshay: It didn't come—my point is that it didn't come into the United States legally. If it was not disclosed to the Secretary of the Treasury that it was equitably in NYK's name, or was NYK's funds.

Mr. Glicksberg: That is why we disagree.

Mr. Barshay: Mr. Glicksberg says—— [33]

The Court: Well, it originally came in from the Japanese Government.

Mr. Barshay: That's right.

Mr. Glicksberg: From the Japanese Government. That is, under a license.

Mr. Barshay: If Mr. Glicksberg is correct, then a fraud was perpetrated on the Secretary of the Treasury.

Mr. Glicksberg: Not necessarily.

Mr. Barshay: And not vice versa.

Mr. Glicksberg: Counsel is not familiar with the exhibits which I introduced here, that the original

transaction was with the consent of the Secretary of the Treasury.

Mr. Barshay: It certainly doesn't appear.

Mr. Glicksberg: Certainly it doesn't appear from that; those are applications.

Mr. Barshay: These are copies of the official application and the official license.

Mr. Glicksberg: That's correct, Mr. Barshay. The only difficulty is, you haven't read the exhibits. You see the first exhibit of the letter from the Japanese Empire of Japan to the NYK, which has been introduced in evidence here, stating the whole circumstance surrounding the requisitioning of the Japanese vessels and how the course of conduct was to be handled in the name of the Japanese Empire of Japan, under requisition—when it requisitioned vessels with the understanding [34] of the Secretary of State and the State Department, and the licenses were to be given in the name of the Empire of Japan and the funds were to come in. But then the remaining funds, whatever is to be left at the end of the determination of hostilities, were to become the funds of NYK. We submit it, if the Court please.

Mr. Saroyan: May it please the Court, I was prepared to argue this case for forty minutes, and Mr. Glicksberg stated that he was not going to argue, he was going to submit it on the briefs. So I cut it to four. Now he has put in forty minutes. If I can have another three or four minutes to wind up?

The Court: Well, we will give you five more minutes.

Mr. Saroyan: All right. Mr. Glicksberg takes the Singer case and he wants to hang his hat on the Singer case to sanctify a fraud that has been committed on the Government of the United States. And every single application that was filed by Yoshio Muto, representing the government or NYK for its commissions, they stated that that money belonged to the government of Japan. Why was it handled that way? By certain evidence that we contend should be stricken from the record, because of the fact that it was all compiled two or three or four or five or six or seven years after the transaction took place, Mr. Glicksberg fetched that from Japan when he went there; it shows that there were certain communications had between the [35] State Department of the United States and the ministry of treasury in Japan, and the ministry of treasury in Japan said that if NYK is going to run any boats, the creditors of NYK in the United States would be apt to seize those boats for any indebtedness owing to them. Therefore, the government of Japan, wishing to take back its nationals from the western countries, decided that they would requisition that ship, they would own that ship and they would own the funds. Now he comes back and he says the money came here for a license, or with a license. Yes, the money came here by license, where there was no fraud involved at the time, because the money belonged to the Japanese government. It still belongs to the Japanese government. What he wants you to do now is, he wants you to give a conditional judgment here, and he says, "We will

go and file another application to show that that money belongs to NYK and should be paid to NYK." That would be sanctifying a fraud, because at the time that money came over here it belonged to the government of Japan and the license was given to the government of Japan to receive the money here, and a license was also given to NYK to receive \$4700 in commissions as agents.

Number two, the plaintiff, aside from the licenses, is seeking to establish a resulting trust. I am not going to go over all these cases, but they are all in the brief, and I will merely say that in order to establish a resulting trust, [36] you have got to have clear, convincing, unequivocal, unambiguous language to the effect that the money belongs to NYK. Where is that clear and convincing and unequivocal language? It is all in the form of documents—in novel, opinion, hearsay form. Some of it even has been written up at or about the time Mr. Glicksberg went to Japan in 1947 or '48. The rest of it was between a year and seven years—all opinions in the form of letters and so on, as a result of some discussion or some controversy that had arisen between the Japanese government and NYK after all the rights here have been vested. Also, after the Government of the United States had extended its—had stepped in and vested this account owned by the Department of Justice today.

Mr. Barshay says that he doesn't know whether a license would have been granted to NYK if NYK had at that time said to the Treasury Department of the United States, "This money is ours and we

are sending it over there.” My answer to that, which is just opinion, would be that the license would not have been granted, because NYK wanted a conditional license that “we will send money over there but it has to be free and exempt from any attachment and execution, so that no creditors of NYK could grab it.” Well, our law doesn’t permit that under our constitution. Therefore, what do they do? They tried to use a fraud. If it was a fraud, if the money belonged to NYK, my contention is that that money [37] belongs to the government.

We respectfully submit that the court should look upon this transaction as money having been sent here by the Japanese government, as further monies having been accumulated here by the Japanese government, that the Alien Property Custodian coming along and vesting the account, meaning now that it owns the account; and the balance of that money is due and owing to the office of the Alien Property.

We submit that a judgment should be rendered here in favor of the defendant Superintendent of Banks and in favor of the plaintiff in intervention and against the plaintiff.

The Court: Now all of you have had a full opportunity to present your views.

Mr. Glicksberg: I want to thank Your Honor for your patience and kindness.

The Court: Now you wish findings in this case?

Mr. Glicksberg: Yes, Your Honor.

Mr. Barshay: Yes, Your Honor.

The Court: Do you wish findings in this case?

Mr. Saroyan: Yes, Your Honor.

The Court: All right, prepare it—both sides prepare a form of findings to be submitted. Now when?

Mr. Glicksberg: How much time do you want, Mr. Saroyan? You are going away on vacation.

(Whereupon a discussion was had among court and counsel regarding time for submission of memoranda and final submission of the matter.)

[Endorsed]: No. 13156. United States Court of Appeals for the Ninth Circuit. Sterling Carr, Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt, Appellant, vs. The Yokohama Specie Bank, Ltd., of San Francisco, a foreign corporation, and Maurice C. Sparling, as Superintendent of Banks of the State of California and Liquidator of the Yokohama Specie Bank, Ltd., San Francisco Office, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 9, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13156

STERLING CARR, Etc., Appellant,

vs.

THE YOKOHAMA SPECIE BANK, et al.,
Appellee.

J. HOWARD McGRATH, Etc., Appellee,

vs.

STERLING CARR, Etc., Appellant,

STERLING CARR, Etc., Appellant,

vs.

J. HOWARD McGRATH, Etc., Appellee.

RESTATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

Appellant adopts as the statement of points upon which he intends to rely upon this appeal, the statement of points filed by him in the above entitled action in the United States District Court for the Northern District of California, Southern Division, on November 2, 1951.

/s/ LOUIS J. GLICKSBERG,
Attorney for Appellant.

Acknowledgements of Service attached.

[Endorsed]: Filed Dec. 1, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF PARTS
OF RECORD TO BE PRINTED

To the Clerk of the above entitled Court:

Plaintiff and appellant herein respectfully requests that the following portions of the record, proceedings and evidence be included and contained in the Record on Appeal, to wit:

1. Complaint of plaintiff and appellant.
2. Answer of defendant The Yokohama Specie Bank, Ltd., and Superintendent of Banks of the State of California.
3. Complaint of Alien Property Custodian as intervening plaintiff.
4. Answer and cross-complaint of Sterling Carr, Trustee, to complaint of Alien Property Custodian.
5. Answer of Alien Property Custodian to cross-complaint of Sterling Carr, Trustee.
6. Order of the United States District Court denominated "Memorandum Opinion" dated August 17, 1951 and filed upon said date, ordering that there be entered, upon findings of fact and conclusions of law, judgment in favor of defendants and plaintiff in intervention and against plaintiff.
7. Findings of fact and conclusions of law signed by the Court on August 17, 1951.
8. Judgment entered herein on the 20th day of August, 1951.
9. Appellant's cost bond on appeal.
10. Appellant's notice of appeal.

11. Statement of points upon which appellant intends to rely on appeal.

12. Order extending time for filing appellant's record on appeal and docketing appeal.

13. The designation to the Clerk of the United States District Court of contents of record on appeal.

14. Certificate of Clerk of the United States District Court to Record on Appeal.

15. Reporter's transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the Court, also all objections or exceptions of counsel, included in the proceedings of April 11, 12 and 13 and July 25, 1951.

16. Restatement of points upon which appellant intends to rely on appeal.

17. Stipulation and order for inclusion of original exhibits and deposition in evidence.

18. This designation of parts of record to be printed.

/s/ LOUIS J. GLICKSBERG,
Attorney for Appellant.

Acknowledgments of Service attached.

[Endorsed]: Filed Dec. 10, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]`

STIPULATION FOR INCLUSION OF ORIGINAL EXHIBITS AND DEPOSITION IN EVIDENCE

It Is Stipulated by and between the Appellant and the Appellees that all of the original exhibits introduced in evidence, including the deposition upon interrogatories of Seishi Hiroyoshi, with its annexed original exhibits, may be considered part of the record on appeal without the necessity of the same being printed.

Dated at San Francisco, California, November 30, 1951.

/s/ LOUIS J. GLICKSBERG,
Attorney for Appellant.

/s/ S. M. SAROYAN,
Attorney for Appellee, Superintendent of Banks.

/s/ VALENTINE C. HAMMACK,
Attorney for Appellee, J. Howard McGrath, Atty. Gen., etc.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of
Appeals,

/s/ WILLIAM HEALY,

/s/ WM. E. ORR,
Judges, U. S. Court of Appeals
for the Ninth Circuit.

Dated San Francisco, California, December 10,
1951.

[Endorsed]: Filed Dec. 12, 1951. Paul P. O'Brien,
Clerk.

No. 13,156

IN THE

United States
Court of Appeals

For the Ninth Circuit

STERLING CARR, Trustee of the estate of
Nippon Yusen Kaisya, a corporation,
bankrupt,

Appellant,

vs.

THE YOKOHAMA SPECIE BANK, LTD., OF
SAN FRANCISCO, a foreign corporation,
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of Cali-
fornia and Liquidator of the Yokohama
Specie Bank, Ltd., San Francisco Office,

Appellees.

Appellant's Opening Brief

Appeal from the Judgment of the United States District Court for
the Northern District of California, Southern Division.

LOUIS J. GLICKSBERG,
1 Montgomery Street,
San Francisco 4, California,

Attorney for Appellant

FILED

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PAUL P. O'BRIEN

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IN THE
United States
Court of Appeals
For the Ninth Circuit

STERLING CARR, Trustee of the estate of
Nippon Yusen Kaisya, a corporation,
bankrupt,

Appellant,

vs.

THE YOKOHAMA SPECIE BANK, LTD., OF
SAN FRANCISCO, a foreign corporation,
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of Cali-
fornia and Liquidator of the Yokohama
Specie Bank, Ltd., San Francisco Office,

Appellees.

Appellant's Opening Brief

Appeal from the Judgment of the United States District Court for
the Northern District of California, Southern Division.

JURISDICTION

This is an appeal by Sterling Carr, Trustee in Bank-
ruptcy, from final judgment of the United States District
Court for the Northern District of California, Southern

Division, entered August 20, 1951, ordering, adjudging and decreeing that plaintiff take nothing by reason of his complaint or cross-complaint, and that defendant Maurice C. Sparling, Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd. San Francisco Office, have judgment against plaintiff for his costs of suit, and that plaintiff in intervention also have judgment against plaintiff for his costs of suit.

The jurisdiction of the United States District Court was invoked under U. S. Code, Title 28, section 1332.

The jurisdiction of plaintiff in intervention was invoked under the Act of March 3, 1911; 36 Stat. 1091; U. S. Code, Title 28, section 41(1) and under the Act of October 6, 1917; 40 Stat. 425; U. S. Code, Title 50, Appendix, section 17.

Notice of appeal was filed on September 11, 1951 (U. S. Code, Title 28, section 2107, Rule 73 R.C.P.).

The jurisdiction of this Court is invoked under Jud. Code Sec. 128; U.S. Code, Title 28, section 1291.

STATEMENT OF THE CASE

Identity of Parties to the Case.

Sterling Carr, the appellant, is the trustee in bankruptcy of Nippon Yusen Kaisya, a corporation, organized under the laws of Japan, with its principal office and place of business in Tokyo. Pursuant to involuntary petition of American creditors, Nippon Yusen Kaisya was adjudicated a bankrupt and ever since July 2, 1942, plaintiff and appellant has been the trustee of the estate of the bankrupt.

Plaintiff in intervention and cross-defendant is J. Howard McGrath, Attorney General of the United States, as successor to James E. Markham, former Alien Property Custodian.

The history of said intervention is as follows: The original action of the trustee in bankruptcy was against The Yokohama Specie Bank, Ltd. and the Alien Property Custodian. The Alien Property Custodian filed a motion to dismiss for lack of jurisdiction, and then by agreement with plaintiff, intervened as a plaintiff in intervention to said complaint. Sterling Carr, the trustee, answered and filed a cross-complaint; James E. Markham, Alien Property Custodian, then filed his answer to said cross-complaint (Tr. 77-8).

The remaining defendant, Superintendent of Banks of the State of California, as liquidator of The Yokohama Specie Bank, Ltd. of San Francisco, a foreign corporation, took over the business and affairs of said bank on or about December 8, 1941 for the purpose of conservation and/or liquidation.

Nature of the Case.

The complaint states a cause of action to quiet title to personal property, to wit, the sum of \$66,892.65 (which sum was corrected to \$66,884.15) standing in the name of "Consul General—Yoshio Muto Special Account" on deposit with Yokohama Specie Bank, San Francisco (Tr. 7-11, inc.).

Plaintiff, as trustee in bankruptcy, asserts that a trust is imposed by law upon these funds in favor of the American creditors of Nippon Yusen Kaisya, since all moneys in said account were funds of Nippon Yusen Kaisya (hereafter referred to as "NYK"), including proceeds of sales of passenger tickets on the Japanese Government requisitioned vessel *Tatsuta Maru*, voyage 69-0 and voyage 69-H,

and the further fact that the Government of the Empire of Japan concedes that said \$66,884.15 is the property of NYK (Tr. 70-82, inc.).

Plaintiff in intervention, as successor to the former Alien Property Custodian, asserts a claim solely by virtue of Amendment to Vesting Order No. 256 dated September 7, 1943, made pursuant to the Trading with the Enemy Act (Tr. 24).

Defendant Superintendent of Banks asserts that he is holding the funds in the account solely for the person in whose name the account stands, to wit, Yoshio Muto, Consul General of Japan, and in the absence of a Court order adjudicating the funds as payable to the trustee in bankruptcy, said defendant must comply with Vesting Order No. 256 and take the position that the title to said money is vested in plaintiff in intervention (Tr. 21).

Statement of Facts.

Since all of the evidence introduced by the trustee in bankruptcy, the Superintendent of Banks, and plaintiff in intervention stands uncontradicted, the case can indeed be considered as resting on a stipulated set of facts. Neither the Superintendent of Banks nor plaintiff in intervention has introduced any affirmative proof other than the bare status of the account, and a series of Treasury Department permits for receiving payments into the account and making withdrawals therefrom. We therefore ask the Court's indulgence and patience while we summarize, somewhat fully, all of such uncontradicted testimony.

During September and October 1941 there was discussion between the Governments of Japan and the United States

with a view to working out an arrangement for the repatriation of Japanese nationals who desired to return home because of the application of the monetary freezing order of July 26, 1941 (Executive Order No. 8389 as amended) under which all trade and maritime relations between Japan and the United States ceased. (Plaintiff's Exhibit 20-E, page 1; Tr. 194-5.)

Because of fears that vessels of privately owned Japanese steamship companies would be seized upon entry into the United States by suits brought by American creditors of said aliens, and because the United States Government would not guarantee that privately owned Japanese vessels would be exempt from seizure upon such legal process (Plaintiff's Exhibit 20-E, pp. 2 and 3), it was agreed between the two Governments that the vessels of two Japanese steamship lines, NYK and Osaka Shosen Kaisha, should be dispatched as nominally Japanese Government requisitioned ships. Such procedure would allow the ships freedom to enter and leave the ports of the United States without fear of seizure and detention by suits of American creditors of the steamship companies.

Pursuant to said agreement between the two Governments, on September 30, 1941, the Cabinet of the Japanese Government decided to arrange a special assignment of the *M.S. Tatsuta Maru* to sail from Yokohama on October 10, 1941 (this was later changed to October 15) to pick up Japanese nationals desiring repatriation from Honolulu and San Francisco (Plf.'s Exhibit No. 20(E), pages 1 and 2).

In addition, the Government of Japan agreed to allow American nationals desiring to return to the United States to sail on this vessel (Plf.'s Exhibit No. 20(E), page 5).

It was arranged between the Empire of Japan and the NYK that operation costs of said vessel would be borne by NYK, but that inasmuch as all Japanese funds in the United States were frozen by virtue of said "freezing order" of July 26, 1941, it was deemed appropriate to transmit NYK funds originating in Japan, via the YSB, direct to the Consulates at the ports of call, in amounts sufficient to take care of the said operations costs (Exhibit 20(E), page 6). It was decided to so transmit for so-called "bunker charges" the total sum of \$96,100.00, which included the \$39,000.00 to San Francisco for use in outfitting the *Tatsuta Maru* for the home voyage (Plf.'s Exhibit 20(E), page 7). This \$96,100.00 originated with the NYK home office in Tokyo and was transmitted by cable transfer on October 20, 1941, in Japanese yen (410,026.22) (Plf.'s Exhibit No. 20(C), Debit Note) and converted on that date to foreign exchange currency (Plf.'s Exhibit 20(A)—Application for approval to purchase foreign exchange notes). Said sum was on said date turned over by the NYK to the Foreign Ministry of the Japanese Government (Plf.'s Exhibit No. 20(B)—Receipt) and transmitted by the Japanese Government through YSB Tokyo by telegraphic transfer to the United States (Plf.'s Exhibit 20(B)—Temporary Receipt). Of this sum \$39,000.00 was transferred into the account entitled "Consul General—Yoshio Muto Special Account" on deposit in YSB San Francisco (Plf.'s Exhibit 20(B) — Receipt, Plf.'s Exhibit 25). Thus the account which is the subject of this action was set up with this initial deposit of \$39,000.00 (Plf.'s Exhibits Nos. 1, 21, 22, 23, 24, 26, 27 and 30).

In addition to the \$39,000.00 remitted as aforesaid, there was also deposited in said account at YSB San Francisco,

additional moneys received from the sale of passage tickets in the United States to Japanese nationals returning home upon the *Tatsuta Maru*, in the sum of \$66,937.43, making total deposits of \$105,937.43 (Plf.'s Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20(D), page 3, and Exhibit 21). From the account the total sum of \$39,053.28 was withdrawn for the purpose of paying expenses of outfitting the *Tatsuta Maru* for the voyage to Japan, Voyage 69-H, departing from San Francisco November 2, 1941, leaving a balance in said account as of December 7, 1941, \$66,884.15 (Plf.'s Exhibits Nos. 2, 20(D), page 3, and Plf.'s Exhibits 21 and 30).

In addition to the passenger fare collections deposited in said account, NYK and the Empire of Japan (through the Consul General at San Francisco) validated and recognized outstanding tickets issued many months before by the NYK in Japan, and provided such holders of tickets with space upon the *Tatsuta Maru*. All such fares had been sold and the money deposited in the various places, such as Yokohama, Seattle, Los Angeles, Tokyo, etc. (Plf.'s Exhibits Nos. 4, 7, 10, 11, 12, 15, 16, 20(I) and (J)).

In addition, passage was furnished returning Japanese members of Japanese firms located in the United States, with the understanding that the fares would be paid on arrival in Japan, exclusively to the NYK Tokyo office (Plf.'s Exhibits Nos. 11, 17, 20(I) and (J)). Such payments were made and received by the NYK Tokyo, none of them ever being paid to the Empire of Japan or to Yoshio Muto individually, in Japan or elsewhere (Plf.'s Exhibit 20(I) and (J)).

NYK operated the vessel, furnished the services for said operations and kept all of the records thereof. Yoshio Muto

was merely custodian of the funds in name and paid same out without question upon request of NYK, San Francisco office (Plf.'s Exhibit No. 2 found in records of NYK, San Francisco office). Only in such a manner could a proper accounting with the Japanese Government be made at the end of the voyage pursuant to the understanding contained in the agreement between NYK and the Empire of Japan (Plf.'s Exhibit No. 20(E), page 6). According to said agreement, after accounting for all advances and passenger collections, the Japanese Government agreed to reimburse NYK for any losses resulting from the operations of the repatriation ships (Plf.'s Exhibit No. 20(F)). Furthermore, the Japanese Government admitted that the funds in all of these Consulate special accounts were moneys belonging to NYK and conceded that such accounts only took the form of special consulate accounts as a formality, owing to the application of the Freezing Act (Plf.'s Exhibit 20(F), letter from Chief Accountants Bureau directed to Ministry of Foreign Affairs, and letter from Ministry of Foreign Affairs to President, NYK).

Furthermore, it was agreed by and between the Japanese Government and NYK that the said balance of \$66,884.15 was to be returned to NYK after an accounting was had and settled between NYK and the Empire of Japan (Plf.'s Exhibits 20(D), (E) and (F)).

ERRORS ASSIGNED BY APPELLANT

- I. The District Court Erred in Failing to Make a Finding on the Issue "Did NYK Furnish or Provide the Consideration Out of Which the Bank Account Involved Arose?"
- II. The District Court Erred in Holding That the Evidence of Appellee (Exhibits F, H, I, J and K) Is Contradictory to the Resulting Trust Theory of Appellant.
- III. The District Court Erred in Holding, as a Matter of Law, That the Evidence Before the Court Sustains a Finding That the Tatsuta Maru Was a Japanese Government Requisitioned Vessel.
- IV. The Court Erred in Holding That Said Transaction, if the Basis of a Resulting Trust, Was One in Violation of Federal Laws.

ARGUMENT

I.

The District Court Erred in Failing to Make a Finding on the Issue "Did NYK Furnish or Provide the Consideration Out of Which the Bank Account Involved Arose?"

The District Court stated that two issues were presented for decision—one of fact and one of law, as follows (Memorandum Opinion, Tr. p. 39):

- "I. Did NYK furnish or provide the consideration out of which the bank account involved arose?
- "II. Even if it did, was it a transaction to which the courts can give judicial recognition since it was in violation of Federal laws?"

The District Court, in holding that the evidence introduced by plaintiff "falls short of establishing a resulting trust", found as follows (Memorandum Opinion, Tr. pp. 46-7):

"To support his position the plaintiff introduced documentary evidence and the deposition of one Seishi Hiroyoshi taken in Tokyo on interrogatories and cross-interrogatories. Much of this evidence was admitted

subject to motion to strike on the ground that it was hearsay and no foundation had been laid. The deposition discloses that the witness was employed in NYK's New York office during the period involved and that his only knowledge of the transaction came from certain papers that he found in the files of NYK's Tokyo office several years later. The Court was liberal in admitting such evidence, having in mind that this is an action in equity. However, it is axiomatic that to establish a resulting trust the evidence must be clear and convincing. In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created. To find such a trust relationship the Court would have to rely on opinions and conclusions of the witness and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened. When this evidence is weighed against the undisputed evidence that the Tatsuta Maru was operated as a Japanese Government requisitioned vessel, that NYK and the Government of Japan stated under oath that no one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department to be paid an agency fee for its handling of the ship, it falls short of meeting the 'clear and convincing' test necessary to establish a resulting trust."

In support of this conclusion the Court must have relied upon the following exhibits for the defendant:

Exhibit F. Application No. SF 11537 (Tr. p. 325)

Exhibit H. Application No. SF 11539 (Tr. p. 329)

Exhibit I. Application No. SF 11540 (Tr. p. 329)

Exhibit J. Application No. SF 11541 (Tr. p. 332)

Exhibit K. License No. 12971, 11/19/41 (Tr. pp. 334-335)

Nevertheless, in arriving at its decision the Court has failed to answer the issue—"Did the NYK furnish or provide the consideration out of which the bank account involved arose?" The Court, in failing to make a finding on this issue, completely disregarded the uncontradicted fact that NYK Tokyo did provide the funds (Exhibits A, B, C, D, E and F attached to deposition of Hiroyoshi, Tr. commencing p. 168). In order to arrive at its decision the Court negatively answers the question by stating that the appellant trustee in bankruptcy, at the trial, had failed to establish by clear and convincing evidence that a resulting trust exists. In arriving at this conclusion the Court erred in refusing to take into its consideration the underlying, undisputed fact that the bank account in issue came into being by the \$39,000 of NYK money forwarded from Japan to Yoshio Muto at San Francisco. The Court in stating in its opinion that appellant, representing the creditors, had no beneficial interest in the account, is begging the question which the Court submitted to itself for answer. Actually, the Court has refused to decide the basic and vital issue raised by the first point, and the failure of the Trial Court to make a finding upon this issue is one of the grave errors of which appellant complains.

II.

The District Court Erred in Holding That the Evidence of Appellee (Exhibits F, H, I, J and K) Is Contradictory to the Resulting Trust Theory of Appellant.

Appellant respectfully submits that the Trial Court has fallen into the error of considering defendant's exhibits solely and apart from the entire testimony and out of context, instead of being part and parcel of the entire testimony which evidences, as a whole, the plan and arrangement by which NYK Tokyo forwarded the consideration to the Japanese Government, which then cabled the money to Consul Yoshio Muto in San Francisco, all in conformity with the prior agreement between the Secretary of State of the United States and the Japanese Government to have it appear that the NYK vessels had been requisitioned by the Japanese Government.

The error of the Trial Court is even more apparent when upon examination we find that the Trial Court, although referring to the testimony introduced by appellant (deposition of Hiroyoshi and the exhibits introduced by that witness of the correspondence between NYK Tokyo and the Japanese Government) as of questionable competence, nevertheless in its memorandum opinion embodies verbatim, as conclusively established facts, other portions of the said exhibits. Allow us to refer to the portion of the opinion which finds the following as established facts (Tr. pp. 39-40) :

“In the period immediately preceding the outbreak of war between the United States and Japan, various vessels owned by NYK operated between the two countries, carrying passengers and cargo. Among these was the M. S. Tatsuta Maru. During that period NYK

incurred various obligations to American creditors arising out of the operation of its vessels. When, on July 26, 1941, the President of the United States issued Executive Order No. 8832, extending to Japan and Japanese Nationals the freezing controls imposed upon other countries by Executive Order No. 8389, NYK became greatly concerned lest its American creditors attach its vessels in order to satisfy their claims and the Japanese Government became concerned lest it be unable to return its nationals from the United States to Japan. Efforts by the Japanese Government to have NYK exempted from the freezing order were unsuccessful and it was then decided that the same result could be accomplished if the Japanese Government requisitioned NYK's ships and operated them as Japanese Government requisitioned vessels. Accordingly, in October, 1941, the Tatsuta Maru was requisitioned by the Japanese Government and in that capacity it made its final voyage between the United States and Japan prior to the outbreak of war on December 7, 1941."

The above portion of the opinion is quoted verbatim from the document introduced by plaintiff which sets forth the actual agreement between NYK Tokyo and the Japanese Government (Plaintiff's Ex. 20-E). This error of the Trial Court is readily apparent from the inconsistent weight given by it to portions of the admitted testimony of appellant, as against other portions of the same testimony which the Court elects to totally disregard.

It is appellant's position that there is no contradiction in the evidence introduced by appellees and that introduced by appellant. All of the testimony has to be analyzed together: placed together, all of the evidence reveals a complete and consistent pattern of the steps taken to carry out the agree-

ment between the two nations to accomplish the purpose of having these vessels enter American waters without fear of attachment.

III.

The District Court Erred in Holding, as a Matter of Law, That the Evidence Before the Court Sustains a Finding That the Tatsuta Maru Was a Japanese Government Requisitioned Vessel.

It is the sincere opinion of appellant that every shred of evidence before the Trial Court sustained the legal conclusion that, as a matter of law, any purported requisition was merely one of form and not one of fact, was one of agreement as to outward appearance rather than a requisition of ownership and operation. Legally, in order to meet the test to which the evidence must be put before a court can find that there was a requisitioning in fact instead of in form only, the Court must find an actual position of ownership and operation on the part of the government involved. Appellant maintains that the requisitioning of *M.S. Tatsuta* by the Japanese Government, in accordance with the uncontradicted testimony of the agreement between the two governments, was a *formality* only, whereby the vessel was able to secure immunity from legal process by American creditors.

In order to properly present this legal question it may be well to cite the law controlling the question of the requisitioning of vessels: The dictionary definition of "requisition" is as follows:

"State of being required for use or called into service. To require or take for use; press into service. To demand or take as by authority for military purposes, public needs, etc."

The American College Dictionary, 1948.

The United States Court of Appeals for the Ninth Circuit in the case of

Mitsubishi Shoji Kaisha, Ltd. v. Societe Purfina Maritime (1942), 133 Fed.2d 552 (Cert. denied, 63 S.Ct. 858, 318 U.S. 781, 87 L.Ed. 1148)

on pp. 554-5 of the reported opinion of Judge Denman, states:

“The word ‘requisitioned’ is not one of art. As was said by Lord Justice Pickford of the British Court of Appeals in *The Broadmayne* (1916) P. 64, 114 L.T.R. 891, ‘There is no particular magic in the word (requisition) itself; it does not connote the same state of things in every particular case’. Its various meanings are determinable in a specific instance by other facts. It may mean that the vessel’s title is taken, as in a condemnation proceeding, or her exclusive or partial use for the requisitioning government, or merely that her ownership and earnings remain in her owner, but only for such voyages as are permitted or directed by the government with a view to the national interest.”

In the cited case a libel was filed by Societe Purfina Maritime, a Belgian corporation, hereinafter referred to as “Purfina”, against Mitsubishi Shoji Kaisha, Ltd., a Japanese corporation, and against the diesel oil cargo owned by General Petroleum Corporation of California, and loaded for Mitsubishi’s account on the Belgian tanker *Laurent Meeus* at San Pedro, California, for unpaid freight claimed earned under a charter dated September 21, 1940, executed by Purfina (the owner) and Mitsubishi for the carriage by the tanker of the oil to Japan. The charter made the cargo as well as Mitsubishi liable for the freight. The cargo was

seized under process in rem. General Petroleum appeared as claimant and contested the freight liability of the cargo. The District Court held that the cargo being loaded and the freight moneys due were earned and payable by Mitsubishi, though the voyage was frustrated by certain requisition orders served on the ship's master by representatives of the Belgian Government, and awarded the freight moneys against Mitsubishi and General Petroleum. The appeal was based on an allegation that there was no breach of the charter by Mitsubishi's non-payment of the freight money in that the requisition of the ship by the Belgian Government under order which prohibited the vessel from entering into time charters and required contemplated voyages to be approved by the Belgian Government, released the shipper from liability for freight under the existing charter. The question raised was whether the requisitioning had any more effect than to establish a governmental control over the voyages of the vessel by the owner on its own account. The court so held and affirmed the decree of the district court. On page 556 of the opinion the court stated as follows:

"It seems clear that since Purfina managed the vessel and earned the freight for its own account and not as agent for the Belgian Government, the trusteeship of the net earnings after Purfina had discharged its obligations to Mitsubishi is not a matter of the latter's concern. The net funds were Purfina's property before delivery to the government *with its resultant trust interest.*" (Italic emphasis added.)

On the question of estoppel by virtue of the requisition, the court stated on p. 556 of the opinion as follows:

“ . . . Purfina is not estopped from claiming the freight by the act of the Belgian Government in taking over the tanker for its own use.”

Thus, the court held that requisition of the vessel did not transfer the ownership and earnings from Purfina to the Belgian Government, but merely restricted the use of the vessel to such voyages as were permitted or directed by the Belgian Government. In

The Katingo Hadjipatera (1941), 40 F. Supp. 546

it was held that title to a Greek steamship requisitioned by the Greek Government did *not* pass to the Greek Government because (p. 548) :

“ . . . no endorsement was made either upon the manifest or the register or any other documents of the ship to indicate that there had been any transfer or change of title to the vessel. The same is true of the papers that were filed in the Custom House at New York. . . . “I find that there was no physical possession of the vessel taken under the requisition for the Greek Government at any time prior to the filing of the libel by the libellants herein on March 7, 1941, and the seizure of the ship under the libel and under the writ of attachment.”

The Court held that only the use of the vessel was requisitioned by the Greek Government.

Applying the above legal authorities to the uncontradicted facts in evidence, appellant respectfully submits that there is no conflict in the facts, and the only question before the Trial Court was one of the legal issues, to wit: Was the mere filing of an affidavit by Yoshio Muto, the Consul, stating that the Japanese Government had requisitioned

the vessel, the NYK San Francisco to operate the same as agent, and the rubberstamping of all documents with "Japanese Government Requisitioned Ship", sufficient in law to sustain a finding of requisition of ownership?

It may be well in discussing this question of requisitioning of a vessel, to examine the uncontradicted testimony before the Court:

The Government of Japan at no time took over the actual handling of the business of bunkering and outfitting the vessel at the port of call. As stated in Plaintiff's Exhibit 20-E, page 9 (Tr. 207-208):

"Inasmuch as the *formality* of requisitioning the vessels involved was taken by the Imperial Government at the understanding of the American Government as already mentioned because of the fears of suits being filed for the claims of Americans against the Nippon Yusen Kaisha, *outwardly* the Consulates at the port of call were to take charge of all business in the name of the Imperial Government, but *in actuality, letters of attorney to handle the business were issued by the Consulates to the Yusen branch managers at the ports of call, who took over the business of the supervision of the Consuls concerned.*

"Expenses relevant to the vessel involved and passage revenues at the ports of call shall be defrayed from or deposited in the special accounts *in the name of the Consuls*, especially set up at the Consulates of the ports of call as a result of the aforementioned Japan-American and Japan-Canada negotiations. *Outwardly*, the Consuls were to handle the accounts because of the fact that the vessels were requisitioned by the Government, but *inasmuch as all expenses coming from the assignment of vessels involved were borne by Nippon Yusen and the payments of the expenses were to be*

handled by Nippon Yusen, the managers of Nippon Yusen branch offices handled the receipts and disbursements at the supervision of the Japanese Consuls." (Italic emphasis added.)

Plaintiff's Exhibit 20-F contains the following statement concerning the operation of the vessel (Plaintiff's Exhibit 20-F, letter dated August 30, 1948 from Chief Accountant Bureau of Foreign Affairs Ministry to Chief of General Affairs Bureau, Ministry of Foreign Affairs, Japanese Government, Tr. 212-213):

"As documents relating to the said requisition order are untraceable, it is impossible to draw a clear conclusion as to the nature of this requisition; however, deducing from various circumstances it is believed that in nature the ships were requisitioned ones of the Japanese Government on account of the freezing order of Japanese funds by the United States, but their operation and the relevant accounts were at the responsibility and risk of the Nippon Yusen Kabushiki Kaisha . . . it is considered that the operations for this case were to be executed on the account of the Yusen (Nippon Yusen Kabushiki Kaisha). It was only to avoid the freezing of funds that part of the funds was administered as special accounts of the Consulates." (Italic emphasis added.)

Plaintiff introduced into evidence, without contradiction, certain business records of NYK San Francisco (which had come into appellant's possession as trustee in bankruptcy of NYK) as follows:

1. NYK San Francisco office had possession and custody of the passbook of the Yoshio Muto Special Account (Plaintiff's Ex. No. 1, Tr. 94), also the checkbook of the

Muto Special Account in The Yokohama Specie Bank, Ltd. (Plaintiff's Ex. No. 2, Tr. 95), from which 66 checks had been removed and apparently used, all in the handwriting of NYK employees.

2. NYK kept a passenger record as to said Voyage 69-Home, in the same place and manner as it had been doing before the requisitioning of said vessel by the Japanese Government (Plaintiff's Exhibits Nos. 3 and 6, Tr. 96, 116).

3. NYK sold passage tickets and collected passage moneys for said voyage as principal and did not represent to the public that said passage tickets were sold and passage moneys collected by NYK as the agent of the Japanese Government (Plaintiff's Exhibits Nos. 4, 5, 8-14 inclusive, Tr. 102-8 and 117-131 inclusive).

4. In addition to the passenger fares collected and deposited in the Muto Special Account, NYK San Francisco, with the consent of the Japanese Government through its Consul General at San Francisco, validated and recognized outstanding steamship tickets issued many months before by NYK in Japan and elsewhere, and provided holders of such tickets with space upon the *Tatsuta Maru* for Voyage 69-H. All of such tickets had been sold and the money deposited to the account of NYK in various places, such as Yokohama, Tokyo, Seattle, Los Angeles, New York, etc. (Plaintiff's Exhibits Nos. 4, 7, 8, 9, 10, 11, 12, 15, 16, 20-I and 20-J, Tr. 102, 117-128, 132-4, 238-245 inclusive). The passenger fares collected by NYK and not deposited in the Muto account were at no time turned over to the Japanese Government. At no time did the Japanese Government request these funds remitted to it (Tr. 245-6).

5. Passage was furnished returning members of Japanese firms located in the United States, on the understand-

ing that the fares would be paid on arrival in Japan, exclusively to the NYK Tokyo office (Plaintiff's Exhibits Nos. 11, 17, 20-I and 20-J, Tr. 127, 134, 238-245 inclusive). Such payments were made to and received by NYK Tokyo, none of them ever being remitted to the Japanese Government, none of them ever deposited in the Muto Special Account in The Yokohama Specie Bank San Francisco (Plaintiff's Exhibits 20-I and 20-J, Tr. 238-245 inclusive).

There is no escape from the uncontradicted evidence that there was no change of ownership or operation of the *Tatsuta Maru* by the requisitioning of the vessel for Voyage 69-H by the Japanese Government; actual ownership and operation remained in NYK as before.

It is the position of appellant that all the evidence, including that submitted by the appellees, sustains only one legal conclusion: That any purported requisitioning of the *Tatsuta* was not a transfer of ownership and operation but merely a formality. In fact, the very act of paying to the NYK a "handling commission" and "agency fee" for services rendered (which services were the sole services necessary for the entire operation of the vessel on its return voyage) brings into further relief the absurdity of the claim that this vessel was a government requisitioned ship. The application for a license to receive these elaborately computed "commissions" was just one more link in the chain of steps taken in accordance with the plan by means of which the vessel's immunity from American creditors of NYK could be insured. In reality, the opportunity of NYK San Francisco to receive the sum of \$4771.58 American money into its blocked account under the guise of an agency fee and handling commissions was a very welcome one, inasmuch as all direct applications made to the Treasury

Department by NYK San Francisco to receive monies into its account had been denied (Defendant's Ex. D, Tr. 307-312, inc.). Further, the exhibits introduced by appellant evidence that this payment of purported commissions and agency fees was taken as a deduction in determining the net amount the Japanese Government conceded to be due the NYK in this operation (Tr. 185-193; Exhibit 20-D attached to deposition of Hiroyoshi).

Appellant submits that as a matter of law the Trial Court committed an error in arriving at its decision, and that as a matter of law the only possible decision of the Trial Court was that the \$39,000 initially deposited in the Yoshio Muto account was money actually received from NYK Tokyo, to which were added passenger fares, all diminished by the expenses of outfitting the vessel in San Francisco for the home voyage.

In support of plaintiff's position of having proven as a matter of law the existence of a resulting trust, it may be well to cite the law applicable to resulting trusts:

LAW GOVERNING THE SUBJECT MATTER.

In Federal Courts, except in matters governed by the Federal Constitution or Acts of Congress, the applicable law is the law of the State.

28 U.S.C.A., Sec. 725;

Erie R. R. Co. v. Tomkins (1938), 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

Therefore the law to be applied here in determining the question of resulting trust is the law of the State of California.

LAW APPLICABLE TO RESULTING TRUSTS IN THE STATE OF CALIFORNIA.

“When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made”.

California Civil Code, Sec. 853.

It has been held by decisions of the Courts of the State of California that the above principle proclaimed by C.C. 853 applies to transfers of personal property.

25 *Cal. Jur.* 181, par. 49;

Norman v. Burks (1949), 93 *Cal. App.2d* 687, 691 (209 *P.2d* 815);

Moore v. Wimmer (1946), 77 *Cal. App.2d* 199, 209 (174 *P.2d* 640);

Goes v. Perry (1941), 18 *Cal.2d* 373, 379 (115 *P.2d* 441);

Kirk White & Co. v. Bieg-Hoffine Co. (1935), 6 *Cal. App.2d* 188, 191 (44 *P.2d* 439);

Grant v. Heverin, 77 *Cal.* 263, 265 (18 *P.* 647);

Thompson v. Bank of California (1906), 4 *Cal. App.* 660, 666-8 (88 *P.* 987).

Wherever it appears that a claimant or his predecessor in interest voluntarily furnished the whole or a part of the consideration, the presumption or implication of law is that a resulting trust exists.

25 *Cal. Jur.* 180, par. 48;

O'Rourke v. Skellenger, 169 *Cal.* 270, 272 (146 *P.* 633);

Brown v. Spencer, 163 *Cal.* 589, 593 (126 *P.* 493);

Tryon v. Huntoon, 67 *Cal.* 325, 327 (7 *P.* 741).

“A resulting trust is implied from the facts, and neither written evidence of an agreement nor a fraud

on the part of the alleged trustee is essential to its existence. It arises where title of a property is vested in the trustee while the consideration therefor is paid by the beneficiary.”

Bradley v. Duty (1946), 73 Cal. App.2d 522, at page 526 (166 P.2d 914).

Therefore once plaintiff, the Trustee in Bankruptcy has offered evidence establishing that the NYK supplied the money deposited in the account in question, the burden then shifts to the plaintiff in intervention to submit testimony denying the existence of such resulting trust.

PROOF NECESSARY TO ESTABLISH RESULTING TRUST.

As to the nature of the proof necessary to establish a resulting trust, California decisions have been liberal in allowing circumstantial and indirect evidence:

Hansen v. Bear Film Company, Inc. (1946), 28 Cal. 2d 154 (168 P.2d 946).

Citing from the *Hansen* case, the Court stated, page 175:

“ . . . Here the written instrument purported only to divest the transferor of title and vest it in the transferee. It contained no recital that the transferee was to hold the property for her own benefit, nor did it mention a trust or beneficial interest. Under the circumstances, the applicable rule, is that found in the Restatement, Trusts, section 38, subdivision 3: ‘If the owner of property transfers it inter vivos to another person by a written instrument in which it is not declared that the transferee is to take the property for his own benefit or that he is to hold it in trust, extrinsic evidence may be admitted to show that he was intended to hold the property in trust either for the transferor or for a third party.’ See also, *Beeler v. American*

Trust Co., 24 Cal.(2d) 1, 20-21 (147 P.2d 583); *Estate of Gaines*, 15 Cal.(2d) 255, 265 (100 P.2d 1055); *In re Kellogg*, 41 Cal. App.(2d) 833, 840 (107 P.2d 964)."

Applying the above law to the undisputed facts, this case presents no intricate legal questions. Basically, the Superintendent of Banks has on deposit \$66,884.15 waiting for some claimant to prove ownership. No one has claimed this money other than the plaintiff Trustee in Bankruptcy. The time to file claims has long ago expired so there can be no other claimant. The claim of plaintiff in intervention is not a claim based upon the facts in the case, but only because the account stands in the name of an enemy alien. It is undisputed that plaintiff in intervention, the Alien Property Custodian, vested himself of this money (Vesting Order No. 256) the same as that official has vested himself of the property of the NYK to the extent of any surplus which may remain in the hands of the Trustee in Bankruptcy *after* payment of all allowed claims of American creditors (Vesting Order No. 371, Plf's Exhibit No. 31, Tr. 358).

All parties before this Court are custodians, charged with the duties of administering the estates of these enemy aliens. Plaintiff in intervention has conceded (Vesting Order 371 vesting the surplus) that the property rights of the NYK in the United States should be administered by the plaintiff Trustee in Bankruptcy, and has advised the Court that if the Court is satisfied that the funds in this account should go to the American creditors of the NYK, he has no objection (Def's. Exhibit L, Tr. 359-61 incl.). Under these facts it is indeed difficult to understand the position taken by the custodian, the Superintendent of

Banks. The Superintendent of Banks admits having no right to the funds other than to see that the money is paid to some individual after determination of his right to it by a court of competent jurisdiction. It is the only duty of the Superintendent of Banks to pay this deposit to the person entitled thereto, not to oppose, with the greatest intensity and on slight, flimsy, technical pretenses, the right of the *only* claimant, the trustee acting for American creditors, to obtain funds of the NYK in the United States.

This is not a case where the custodian has to make a choice among several claimants as to which is the rightful owner. Muto, representing the Imperial Government of Japan and in whose name the money stands in a Special Account, has made no claim to it. The Imperial Government, not only by direct statement but by its whole course of conduct, has expressly declared that the money belongs to the NYK. No one at any time has attempted to claim that a single penny of Government money ever went into this account.

The series of occurrences that culminated in the present situation are easily understood, and when understood, the legal principles required to come to a decision are so elementary that they hardly need comment, being nothing more than a decision that would be dictated by elementary law, namely, that when a person has established the fact that he is entitled to certain property which has been, for fully explained reasons, placed in the custody of some other person, that custodian should turn it over to the owner on demand,—particularly when there is no dispute as to the facts nor has any other person ever asserted a claim of any kind to the property.

It is not disputed that the NYK actually operated the *Tatsuta Maru*, paid the expenses of outfitting, collected fares, kept the records, etc. Nor is it disputed that such receipts and disbursements were handled through the mechanics of a "Special Account" in the name of the Consul; the fund in question results from an arrangement by which Japanese nationals in the United States and American nationals in Japan could return to their respective countries, at a time when war was believed inevitable, as expeditiously and efficiently as possible.

In the light of the above, appellant respectfully submits that the Trial Court erred, in a matter of law, in not finding that a resulting trust was in existence in favor of appellant.

IV.

The Court Erred in Holding That Said Transaction, if the Basis of a Resulting Trust, Was One in Violation of Federal Laws.

The Court in submitting the second question stated (Tr. 39):

"Even if it did, was it a transaction to which the courts can give judicial recognition since it was in violation of Federal laws?"

In this respect the Court stated in its opinion as follows: (Tr. pp. 47-48):

"Had plaintiff succeeded, however, his position would be no better. As to NYK the transfer of banking credits from YSB Tokyo to the Muto blocked account in YSB San Francisco and the deposit of additional moneys therein was an unlicensed transaction and hence illegal. The money was lawfully in this country only if the Government of Japan was the sole party having any interest in the fund. To recognize plaintiff's claim would be, in effect, to give judicial approval

to an illegal scheme designed to evade the provisions of the freezing order”.

The Trial Court in its opinion relied entirely upon the case of *Propper v. Clark*, 337 U.S. 472, 69 S.Ct. 1333. It is the opinion of appellant that the *Propper* case does not stand for the conclusion reached by the Court. As a matter of fact, in our opinion, not only does the *Propper* case give no solace to the plaintiff in intervention, but it is one of the chief authorities upon which the trustee in bankruptcy relies. Since so much importance is attached to the *Propper* case, it may be well to carefully analyze the case and what it stands for. The facts are:

AKM, an Austrian firm, had a claim for royalties against ASCAP, an American association. On June 12, 1941 a creditor of AKM made an ex parte application for the appointment of a receiver and pursuant thereto a receiver was appointed by a New York State Court, said receiver taking possession of all funds with the sole purpose of liquidating AKM interests in the United States. On September 8, 1943 the Alien Property Custodian vested itself of all AKM credits and thereupon began an action in the New York Federal District Court to obtain these funds and a declaration of title in the Alien Property Custodian as against the receiver of the Austrian association. It was stipulated that no Treasury license was received by the State receiver.

The sole issue before the Supreme Court was as follows:

In a Federal case did title to funds of an Austrian association in the hands of an American debtor pass, upon the receivership appointment, to the receiver of the Austrian

association by an unlicensed judicial transfer (operation of law)?

The Supreme Court held that the transfer of a credit resulting from a liability owed by the American association to the Austrian association, to a liability owed by said American association to the receiver of the said Austrian association, violates the prohibition against transfers of credit, as no license was obtained. In brief, the Supreme Court held that a court of law by judicial process could not transfer title to a credit without first having obtained a license from the Treasury Department. In other words, under the *Propper* decision, the only thing the Supreme Court decided was that a receiver, or for that matter this trustee, could not, without first obtaining a license from the Treasury Department, have *title* to any funds subject to the freezing order, declared as being in the receiver or trustee. Title cannot shift by operation of law from person to person except by license, and possession by such receiver is without right.

Let us now squarely analyze the question of whether the trustee in bankruptcy in the case at bar falls within any of the restrictions and limitations covered by the *Propper* case. We cannot too emphatically urge this Court that we are not in this proceeding seeking to have the fund of Muto actually transferred over to the trustee in bankruptcy. To request such a determination by this Court we concede would require the necessity of the trustee securing a license from the Treasury Department. Without such a license, we concede, the trustee could not take title.

But that is very far afield from what the trustee in this case is requesting. The trustee is not requesting possession

of the account, but merely a judicial determination of the respective rights of the Office of Alien Property as the successor in interest of the Empire of Japan, as against the trustee in bankruptcy as successor of the American creditors of the NYK. In our case we are only asking the Court to determine in whom beneficial title to the fund should rest, and, if in this litigation that issue should be determined in favor of the trustee in bankruptcy, then the trustee would have to file an application with the Treasury Department for a license, and only after procuring such a license could the Yoshio Muto funds be transferred into his name.

At this stage of the proceedings the only issue before the Court is, who has the greater right to title to the funds, the Alien Property Custodian or the American creditors of the NYK; all we are requesting of the Court is that there be a factual determination of rights between the two claiming parties, with the understanding that there can be no *actual* transfer, after this Court's determination, without the securing of a license. The real issue before the Court is not whether any transaction involved herein is unlicensed and therefore null and void as in the *Propper* case, but, who is factually entitled to the money in the account. In our case a transfer by the respective parties would be made only after a license has been granted. We cannot too strongly emphasize that what we are seeking is to have the respective rights between two parties clarified, and only after such clarification by the Court would the implication of the *Propper* case come into force. We maintain that the *Propper* case has no application to the case at bar until this Court makes a determination in favor of the trustee in bankruptcy.

In fact, appellant relies upon the *Propper* case and other like decisions for substantiation of his right to come before the District Court for a judicial determination of the right to this fund as between the Office of Alien Property and the trustee in bankruptcy.

The Supreme Court in the *Propper* case, p. 1340, states:

“(5) It is true that state litigation between local claimants and foreign owners or those in possession of blocked or frozen assets could proceed to a determination of rights between the claimant and the foreign national without the blocked property passing into hands that might use it to the detriment of the welfare of this nation, so long as payment could not be made without a license. Nothing in the Trading with the Enemy Act or regulations specifically forbids *eo nomine* litigation in state courts. The plan for prohibition of unlicensed transactions by foreign nationals comprehends blocking of transfers of credits and vesting of local assets of such nationals under the Trading with the Enemy Act and regulations thereunder. If transactions are blocked, vesting may or may not follow. When the Custodian vests blocked property, title passes to the Custodian and his authority to vest and hold cannot be questioned except as provided in the Trading with the Enemy Act. The freezing order of June 14, 1941 immobilized the assets covered by its terms so that title to them might not shift from person to person except by license until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected. *United States v. Chemical Foundation*, 272 U.S. 1, 11, 47 S.Ct. 1, 4, 71 L.Ed. 131; *Silesian-American Corp. v. Clark*, 332 U.S. 469, 476, 68 S.Ct. 179, 182, 92 L.Ed. 81.”

and at p. 1341:

“(9) It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this.”

Thus the *Propper* case does allow for litigation between persons claiming rights in a blocked account, to determine their respective rights to the funds in such account.

The Supreme Court by its further action in

Lyon v. Singer, 70 S.Ct. 903, 339 U.S. 841, 94 L.Ed. 1323,

reaffirmed the above basic principle of law, and definitely went so far as to state that a determination between the parties can be had, provided such determination be subject to the securing of a license. It may be well to quote from the case, p. 904:

“Oral argument and study of the record have convinced us that the judgments of the New York Court of Appeals are not inconsistent with the First War Powers Act of 1941, Sec. 301, 55 Stat. 839, 50 U.S.C.A. Appendix, Sec. 616, or the above Executive Orders. We accept the New York court’s determination that under New York law these claims arose from transactions in New York and were entitled to a preference. *Since the*

New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished. Our decision in Propper v. Clark, 337 U.S. 472, 69 S. Ct. 1333, 93 L.Ed. 1480, does not require a contrary conclusion. There the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States. No such result follows from the New York court's judgment in the present cases." (Italic emphasis added.)

In the New York case of

Commission for Polish Relief v. Banca Nationala a Rumanie, 30 N.Y.S. 2, 690, 262 App. Div. 543,

(which is a case on all-fours with the case at bar and was an action between two aliens) the Court held that money in a blocked account was subject to American creditors' rights, provided a license was subsequently secured. In this case plaintiff, a domestic membership corporation, sued a foreign private banking corporation and in such action levied an attachment upon a fund due the foreign corporation in the hands of a Delaware non-profit corporation. The Court approved such action but made the judgment contingent upon the granting of a license. At p. 694 the Court stated:

"The prohibition (of Executive Order) as indicated, extends only to the payment or transfer of the funds. Clearly the sole purpose of the order was to prevent the funds of certain foreign nations, including Rumania, and their nationals, from falling into the hands of aggressor powers. To accomplish this proper result and for no other or different purpose, the banks in this country are prohibited from paying out or transfer-

ring credits due to such foreign nations or their nationals, *without first obtaining the required license from the Treasury Department.*" (Italic emphasis added.)

Furthermore, the Treasury Department by its own ruling, of which this Court will take cognizance and which we asked the Court's leave to introduce in evidence, specifically authorized the conduct of litigation between the respective parties interested in a particular blocked account.

General Ruling No. 12 of the Treasury Department issued under Executive Order 8389 as amended (and which is the ruling declaring transfers of property in a blocked account effected without a license to be null and void), nevertheless specifically, by Section (4) of the Ruling, authorizes and allows parties to proceed with litigation to have their respective rights to a blocked account determined:

"General Ruling No. 12

* * *

"(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; PROVIDED, HOWEVER, That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

Applying the above legal principles to the facts of the case at bar, we submit on behalf of appellant representing the American creditors, that the *Propper* case and all other authorities cited hereinabove affirmatively establish the right of the American creditors of the NYK to have any and all of their rights against the Empire of Japan determined in a Court of competent jurisdiction. This action is taken within the framework of the Executive Orders, and is not an attempt to bypass the Executive Orders.

CONCLUSION

It is submitted that the judgment appealed from is clearly erroneous and should be reversed, and the cause remanded, with directions to the Court below to enter judgment for plaintiff.

Dated: San Francisco, California

March 14, 1952

LOUIS J. GLICKSBERG,
Attorney for Appellant.

No. 13,156
IN THE
United States Court of Appeals
For the Ninth Circuit

STERLING CARR, Trustee of the Estate
of Nippon Yusen Kaisya (a corpora-
tion), Bankrupt, *Appellant*,
vs.

THE YOKOHAMA SPECIE BANK, LTD., OF
SAN FRANCISCO (a foreign corpora-
tion), and MAURICE C. SPARLING, as
Superintendent of Banks of the
State of California and Liquidator
of The Yokohama Specie Bank, Ltd.,
San Francisco Office, *Appellees*.

On Appeal from the District Court of the United States,
for the Northern District of California.

BRIEF FOR APPELLEES, THE YOKOHAMA SPECIE BANK, LTD.,
OF SAN FRANCISCO, A FOREIGN CORPORATION, AND MAURICE
C. SPARLING, AS SUPERINTENDENT OF BANKS OF THE STATE
OF CALIFORNIA AND LIQUIDATOR OF THE YOKOHAMA
SPECIE BANK, LTD., SAN FRANCISCO OFFICE.

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Counsel for Appellees,

*The Yokohama Specie Bank, Ltd., of San
Francisco (a foreign corporation), and
Maurice C. Sparling, as Superintendent
of Banks of the State of California and
Liquidator of The Yokohama Specie
Bank, Ltd., San Francisco Office.*

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P. O'BRIEN,
CLERK

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No. 13,156

IN THE

United States Court of Appeals

For the Ninth Circuit

STERLING CARR, Trustee of the Estate
of Nippon Yusen Kaisya (a corpora-
tion), Bankrupt,

Appellant,

vs.

THE YOKOHAMA SPECIE BANK, LTD., OF
SAN FRANCISCO (a foreign corpora-
tion), and MAURICE C. SPARLING, as
Superintendent of Banks of the
State of California and Liquidator
of The Yokohama Specie Bank, Ltd.,
San Francisco Office,

Appellees.

On Appeal from the District Court of the United States,
for the Northern District of California.

BRIEF FOR APPELLEES, THE YOKOHAMA SPECIE BANK, LTD.,
OF SAN FRANCISCO, A FOREIGN CORPORATION, AND MAURICE
C. SPARLING, AS SUPERINTENDENT OF BANKS OF THE STATE
OF CALIFORNIA AND LIQUIDATOR OF THE YOKOHAMA
SPECIE BANK, LTD., SAN FRANCISCO OFFICE.

JURISDICTION.

Appellant's statement of jurisdiction is erroneous
in that the jurisdiction of the United States District
Court was not invoked under U. S. Code Title 28,

Section 1332. The jurisdiction of the United States District Court was invoked under the Bankruptcy Act of July 1, 1898, Sec. 23, as Amended May 27, 1926, C. 406, Sec. 8, 44 Stat. 664; June 12, 1938, C. 575, Sec. 1, 52 Stat. 85; 11 U.S.C.A. Sec. 46b as disclosed by the pleadings and facts in that Sterling Carr, as Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt, commenced this action in the United States District Court for the Northern District of California, Southern Division, and appellees by filing an Answer to the Complaint of said Trustee, consented to the jurisdiction of said District Court. (R. 3-22.)

Schumacher v. Beeler (1934) 293 U.S. 367, 55 S. Ct. 230, 79 L. Ed. 433.

“Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 96, subdivision b of this title; section 107, subdivision e, of this title; and section 110, subdivision e, of this title.” Act of July 1, 1898 Sec. 23, as Amended May 27, 1926, C. 406, Sec. 8, 44 Stat. 664; June 12, 1938, C. 575, Sec. 1, 52 Stat. 85; 11 U.S.C.A. Sec. 46b.

STATUTES AND PERTINENT REGULATIONS INVOLVED.

The deposits and withdrawals in the bank account involved herein were subject to the provisions of the following statutes, executive orders and regulations:

“(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be from time to time by

the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision."

Trading With the Enemy Act of 1917, Oct. 6, 1917, c. 106, Sec. 5, 40 Stat. 415, as amended; 50 U.S.C.A. App. Sec. 5(b)(1); 12 U.S.C.A. Sec. 95a.

“By virtue of and pursuant to the authority vested in me by Section 5(b) of the Act of October 6, 1917 (40 Stat. 415) (section 95a of this title), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, Franklin D. Roosevelt, President of the United States of America, do prescribe the following:

Section 1. Certain foreign banking transactions prohibited.

All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States):

B. All payments by or to any banking institution within the United States; . . .

F. Any transaction for the purpose of which has the effect of evading or avoiding the foregoing prohibitions.

Section 2. Dealings in foreign securities; regulations.

A. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise;

(1) The acquisition, disposition, or transfer of, or other dealing in, or with respect to, any security or evidence thereof on which there is stamped or imprinted, or to which there is affixed or otherwise attached, a tax stamp or other stamp of a foreign country designated in this Order or a notarial or similar seal which by its contents indicates that it was stamped, imprinted, affixed or attached within such foreign country, or where the attendant circumstances disclose or indicate that such stamp or seal may, at any time, have been stamped, imprinted, affixed or attached thereto; and

(2) The acquisition by, or transfer to, any person within the United States of any interest in any security or evidence thereof if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States.

B. The Secretary of the Treasury may investigate, regulate, or prohibit under such regulations, rulings, or instructions as he may prescribe, by

means of licenses or otherwise, the sending, mailing, importing or otherwise bringing, directly or indirectly, into the United States, from any foreign country, of any securities or evidences thereof or the receiving or holding in the United States of any securities or evidences thereof so brought into the United States.

Section 3. Foreign countries affected; effective date of prohibitions.

The term 'foreign country designated in this Order' means a foreign country included in the following schedule, and the term 'effective date of this Order' means with respect to any such foreign country, or any national thereof, the date specified in the following schedule: . . .

(k) June 14, 1941—China, and Japan . . .

A. The Secretary of the Treasury and/or the Attorney General may require, by means of regulations, rulings, instructions, or otherwise, any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, from time to time and at any time or times, complete information relative to, any transaction referred to in section 5(b) of the Act of October 6, 1917, 40 Stat. 415, as amended, or relative to any property in which any foreign country or any national thereof has any interest of any nature whatsoever, direct or indirect, including the production of any books of account, contracts, letters, or other papers, in connection therewith, in the custody or control of such persons, either before or after such transaction is completed; and the Secretary of the Treasury and/or the Attorney General may, through any agency, investigate

any such transaction or act, or any violation of the provisions of this Order.”

Executive Order No. 8389, as Amended, April 10, 1940, 5 F. R. 1400; 12 U.S.C.A. Sec. 95a, p. 456-457.

STATEMENT OF THE CASE INCLUDING FACTUAL MATTERS INVOLVED.

Appellant's statement of the case cannot be accepted as in material matters it is unsupported by the evidence, omits material facts of the case and is argumentative. Appellant, as trustee in bankruptcy of Nippon Yusen Kaisya, commenced this action in equity to impress in favor of the bankrupt, a resulting trust upon a certain bank account maintained in The Yokohama Specie Bank, Ltd. San Francisco Office, in the name of *Consul General Yoshio Muto, Special Account*, with a balance therein of \$66,884.15.

Appellant is the Trustee in Bankruptcy of Nippon Yusen Kaisya, a Japanese corporation.

Appellee, Maurice C. Sparling, is the Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, in liquidation, and will be hereinafter referred to as the Superintendent, and said office of said bank will be hereinafter referred to as the local bank.

Appellee, J. Howard McGrath, as successor to James B. Markham, former Alien Property Cus-

todian, intervened in this action by filing a complaint in intervention.

Appellee, The Yokohama Specie Bank, Ltd., is a foreign corporation, organized and existing under and by virtue of the laws of the Empire of Japan, and for a long period prior to the time that the transactions involved in this action arose, maintained an office in the City and County of San Francisco, State of California.

Under Section 7 of the Bank Act of the State of California, Stat. 1909, p. 87, Act 652, as amended, Deering's California General Laws, Vol. I, p. 198, the local bank was required to conduct its business in California as a separate and independent corporation from that of the foreign corporation in the same manner as if all the business and affairs of the foreign corporation conducted in the State of California was that of a separate and independent corporation organized under the laws of the State of California for the purposes of doing a banking business.

Prior to July 26, 1941, Nippon Yusen Kaisya, hereinafter referred to as NYK, had engaged in a general shipping business throughout the world with an office located in San Francisco.

On July 26, 1941, Executive Order No. 8389, as amended, hereinafter referred to as the Freezing Order, was promulgated by the President of the United States, pursuant to the authority given by Section 5b of the Trading With the Enemy Act, 40 Stat. 411, as amended; 50 USCA—Appendix. Said

Freezing Order prohibited all financial transactions between any banking institution in the United States and Japan, or any national thereof, unless licensed by the Treasury Department of the United States, through its local agent, the Foreign Fund Control Office of the Federal Reserve Bank. (R. 302-307; Defendant's Exhibit C.)

It was stipulated between the parties that the opening of the bank account involved and all transactions pursuant thereto, were subject to the Freezing Order.

As a result of the monetary Freezing Order, NYK suspended the operation of its ships and services in the United States. (R. 197-198.)

Prior to October 14, 1941, NYK had owned and operated the steamship vessel Tatsuta Maru (sometimes designated in the record as Tatuta Maru).

On October 14, 1941, the Imperial Government of Japan requisitioned said Tatsuta Maru by formally issuing and serving on NYK Requisition Order No. EN No. 2044. (R. 202-204; Plaintiff's Exhibit 20-E.)

The nature, purpose and extent of said requisitioning as set forth in the requisitioning order was as follows:

“The Imperial Japanese Government hereby requisitions the M. S. Tatuta Maru of the Nippon Yusen Kaisya with the view of transporting passengers and mail between Japan and the United States.

The Imperial Government is to operate said ship from Yokohama to San Francisco via Honolulu

on the outbound voyage and from San Francisco to Yokohama on the return voyage, in accordance with the schedule appended to this order.

Let it be noted that the Nippon Yusen Kaisya shall, on behalf of the Imperial Japanese Government, conduct those business matters which may arise in regard to the aforementioned voyage, under the direction of a Supervisor who is to embark the Tatuta Maru by the order of the Government and in conformity with the following stipulation . . .

The Nippon Yusen Kaisya shall submit to the Minister of Communications a detailed statement of income and expenditures at the end of the voyage.”

(R. 203-204; Plaintiff's Exhibit 20-E, page 6.)

Requisitioning of the vessel was made public in the United States. (Plaintiff's Exhibit 20-E, page 5.)

The employees of NYK were appointed to the personnel of the Ministry of Communications of the the Imperial Government of Japan and engaged in the operation of the vessel. (R. 202.)

On October 17, 1941, the Imperial Government of Japan gave a written Power of Attorney to NYK, to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313; Defendant's Exhibit D.) After obtaining the general power of attorney from the Japanese Government, NYK made written application to the United States Treasury Department for a license to handle the Japanese Government requisitioned ship Tatuta Maru in the port

of San Francisco, due to arrive in said port on or about October 30, 1941, and to be operated pursuant to the authority as authorized by the power of attorney executed by Yoshio Muto, Consul General of Japan in San Francisco. NYK stated therein under oath that all receipts and all disbursements arising from the operation of said vessel were independent and had no connection with NYK funds. (R. 309-311.)

Due to the application of the Freezing Order to Japan and the nationals thereof, over 2000 Japanese nationals were left stranded in the United States. The Japanese Government was anxious to return its nationals to Japan. Among Japanese nationals remaining in the United States desiring transportation to Japan were employees of NYK. The Japanese Government had attempted to persuade the American Government to exempt NYK from the Freezing Order. Negotiations by the Japanese Government with the United States Government for the exemption of NYK from the Freezing Order were unsuccessful. (R. 193-202; Plaintiff's Exhibit 20-E.)

On the 21st day of October, 1941, a written application was made to the Treasury Department of the United States by the Japanese Government through Yoshio Muto, Consul General of Japan, requesting that the local bank be allowed to receive a remittance in the sum of \$39,000 from the Japanese Government for deposit into a blocked account in the name of Yoshio Muto for the purpose of making ship disburse-

ments for the Japanese Government requisitioned ship. (R. 258, 314-317; Plaintiff's Exhibit 22.) In said application, the Japanese Government expressly represented and warranted therein that no one other than the Japanese Government had any direct or indirect interest in the remittance for which a license was applied for therein.

Pursuant to said application of October 21, 1941, the Treasury Department of the United States issued license No. S. F. 11630, authorizing the Consul General of Japan in San Francisco to receive a remittance from the Imperial Japanese Government through The Yokohama Specie Bank, Ltd., Tokyo Office, upon the condition that the money be deposited into a Special Blocked Account in the name of Yoshio Muto, Consul General of Japan, solely for the purpose of making ship disbursements pursuant to special licenses authorizing said disbursements. Said license No. S. F. 11630 was granted on October 29, 1941. (R. 258-259, 320-322.)

On October 24, 1941, a written application was made to the Treasury Department of the United States by the Japanese Government through Yoshio Muto, Consul General of Japan, requesting that the local bank be allowed to receive the sum of approximately \$68,000 into the account involved, resulting from the collection of passage fares from the operation of the Japanese Government requisitioned ship. Again, in the application dated October 24, 1941, the Imperial Government of Japan admitted under oath

that no one other than the Imperial Government of Japan had any interest in the income to arise from the operation of the ship involved. (R. 317; Plaintiff's Exhibit No. 29.)

On October 29, 1941, the bank account involved was opened in the local bank with an initial deposit of \$39,000 in the name of Consul General Yoshio Muto Special Account by means of a telegraphic transfer of funds from The Yokohama Specie Bank, Ltd., Tokyo Office, to the local bank. (R. 94, 256, 261-262; Plaintiff's Exhibits Nos. 1, 21, 24, 25 and 26.)

Between October 29, 1941 and November 22, 1941, there was deposited in the account in addition to the original deposit of \$39,000 the further sum of \$66,811.42. (R. 256; Plaintiff's Exhibit 21.) This additional deposit represented income from the sale of tickets for passage fares and excess baggage and mail charges collected by the Japanese Government through its agent, NYK. (R. 102-106, 108-109, 332-336; Plaintiff's Exhibits Nos. 4 and 5, Defendant's Exhibits J and K.)

Between November 1, 1941 and December 2, 1941, there was withdrawn from said account the total sum of \$39,053.28. All withdrawals were pursuant to applications filed with the United States Treasury Department and licenses issued pursuant to said applications. Again in each application for withdrawal, the Japanese Government through its Consul, stated and warranted under oath that no one other than the Japanese Government had any interest in the funds

in said account. (R. 256, 325-332; Plaintiff's Exhibit No. 21, Defendant's Exhibits Nos. E, F, G, H, I and J.)

The Japanese Government through the Consul General applied for and obtained a license for the payment of an agency fee of \$4,771.45 to NYK as and for the handling commission on passage and excess baggage and freight collected by NYK as agent for the Japanese Government. (R. 332-336; Defendant's Exhibits J and K.) Payment of said agency fee was thereafter made to NYK out of the account involved. (R. 343-344.)

On December 8, 1941, the day after Pearl Harbor, the bank was taken over by the Superintendent of Banks of the State of California for the purposes of conservatorship and/or liquidation under Sections 135c and 136 of the Bank Act of the State of California. Stat. 1909, Act 652, as Amended, Deering's California General Laws, Vol. I, pages 295, 299.

On July 2, 1942, NYK was adjudicated a bankrupt corporation and ever since said date appellant has been the trustee of the estate of the bankrupt corporation. On October 3, 1942, under the authority of the Trading With the Enemy Act, as amended, and Executive Order No. 9095, as amended, the Alien Property Custodian of the United States served upon the Superintendent, Supervisory Order No. 39 and Vesting Order No. 1324. Under said Supervisory Order No. 39 the Superintendent undertook the supervision of the business enterprise and property of

The Yokohama Specie Bank, Ltd., San Francisco Office, pursuant to the authority granted and the terms set forth in said supervisory order, and in accordance with and pursuant to the laws of the State of California. (R. 296-306.)

The Alien Property Custodian, acting under the authority granted by the Trading With the Enemy Act, as amended, and pursuant to the powers delegated to him by the pertinent Executive Orders, issued and served upon the Superintendent Vesting Order No. 256, dated October 27, 1942, as amended by Amendment to Vesting Order No. 256, dated September 7, 1942, and Vesting Order No. 371, dated November 18, 1942, vesting and seizing all interests of Yoshio Muto or the Imperial Government of Japan in the bank account. (R. 350-352; Exhibit for Intervening Plaintiff No. 1.)

Contrary to the assertion by appellant, there was never an agreement between the United States Government and the Japanese Government that vessels of two Japanese steamship lines, NYK and Osaka Shosen Kaisya, should or would be dispatched to the United States as *nominally* Japanese Government requisitioned ships. The United States Government informed the Japanese Government that it would require that the vessels be requisitioned with due formality by the Japanese Government and that copies of the requisition papers be attached to the diplomatic papers forwarded to the American Embassy, and required that the Japanese Government state therein that the vessels were under Government missions. In

addition, the United States Government required the Japanese Government to make public the fact that the vessel had been requisitioned by the Japanese Government. (R. 199-201.)

While it may be true that the Japanese Government in statements made years after the transaction involved had been completed, stated that if a loss occurred in the operation of the vessel the Japanese Government after examining the actual operating expenses would compensate NYK for the actual loss incurred, there is no evidence in the record from which it can even be inferred that NYK or any other persons incurred a loss in the operation of the vessel.

While it may be true that employees of NYK furnished some services for the operation of said vessel and kept the records thereof, they did so as agents on behalf of the Japanese Government. The Imperial Government of Japan gave a written power of attorney to NYK to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313.) In addition, on the 22nd day of October, 1941, NYK, in a written verified application to the Treasury Department of the United States, admitted that NYK was acting solely as authorized by the power of attorney. (R. 309-312.) It is true that NYK, as agents, kept the list of passengers and passage money collected for the voyage involved in an account book containing records for prior voyages made by NYK's ships. However, each entry was stamped to reflect the fact that the ship was a "Japanese Government requisitioned ship". (Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 17.)

**QUESTIONS PRESENTED BY ERRORS
ASSIGNED BY APPELLANT.**

The errors assigned by appellant present the following questions:

I. Did the trial court fail to make a finding of fact as to whether NYK furnished or provided the consideration represented by the balance in the bank account involved?

II. Was there a real and substantial conflict in the evidence as to who operated the ship involved or as to who furnished and provided the consideration represented by the balance in the bank account involved?

III. Was the finding of fact of the trial court that "on October 14, 1941, the Imperial Government of Japan requisitioned the steamship vessel 'M. S. Tatuta Maru' and operated said steamship vessel from October 14, 1941 to and including December 7, 1941 for the purpose of returning Japanese nationals located in the United States to Japan" clearly erroneous?

IV. Even if NYK did furnish or provide the consideration represented by the balance in the bank account, involved, can the court give judicial recognition to NYK's beneficial ownership?

SUMMARY OF ARGUMENT.

I. Appellant did not meet the burden of proof required to establish the elements of a resulting trust.

II. Findings of fact shall not be set aside unless clearly erroneous.

III. The trial court found as a finding of fact upon clear and substantial evidence that NYK did not provide or furnish the consideration or money in the balance of said bank account.

IV. The opinion of the trial court provides a clear understanding for the basis of the trial court's decision, and even the absence of a finding as to whether NYK furnished or provided the consideration or money would not constitute reversible error.

V. There was a substantial conflict in the evidence as to who provided or furnished the consideration or money represented by the balance in the bank account.

VI. Clear and substantial evidence sustains the finding of fact that the "Tatuta Maru" was a Japanese Government requisitioned vessel.

VII. Even if NYK did furnish or provide the consideration or money reflected in the balance in the bank account, it was an illegal transaction in violation of Federal Laws and cannot be given judicial recognition.

ARGUMENT.

I.

APPELLANT DID NOT MEET THE BURDEN OF PROOF REQUIRED TO ESTABLISH THE ELEMENTS OF A RESULTING TRUST.

Legal title to the balance in the bank account stood in the name of "Consul General—Yoshio Muto Special Account". Appellant asserts that a resulting trust is imposed by law upon the bank account in

favor of NYK because all moneys in said account were funds of NYK, including proceeds of sales of passenger tickets for the Japanese Government requisitioned vessel "Tatuta Maru". (Appellant's Opening Brief page 3.) It is agreed by all parties that Yoshio Muto did not maintain the bank account in his individual capacity, but instead maintained the bank account in his representative capacity as Consul General for the Empire of Japan.

Since legal title is in the Empire of Japan, and appellant is trying to establish by parol and circumstantial evidence that the Empire of Japan did not really have the beneficial interest in said bank account, the law is well established that the burden was upon appellant to establish by clear, satisfactory, unambiguous, and convincing evidence the elements of a resulting trust.

Hansen v. Bear Film Company, Inc. (1946),
28 Cal. (2d) 154, 168 P. (2d) 946;

Rowland v. Clark (1949), 93 C.A. (2d) 880,
206 P. (2d) 59;

Norman v. Burks (1949), 93 C.A. (2d) 687, 209
P. (2d) 815;

McQuin v. Rice (1948), 88 C.A. (2d) 914, 199
P. (2d) 742;

Redsted v. Weiss (1946), 73 C.A. (2d) 889; 167
P. (2d) 735;

Kobida v. Hinkelmann (1942), 53 C.A. (2d)
186, 127 P. (2d) 657.

As stated in *Kobida v. Hinkelmann* (supra) at page 188:

“... it is well settled that such trusts must be proved by parol evidence, but that the evidence must be clear, satisfactory and convincing. . . .”

In *McQuin v. Rice* (supra) at page 918, the court stated the rule as follows:

“A person in whose name the legal title . . . is vested is presumed to be the absolute owner thereof; and one who claims a resulting trust . . . must establish by clear, convincing and unambiguous testimony the precise amount or proportion of the consideration furnished by him . . . in order that the court may determine the respective rights of the parties in the property purchased; otherwise the legal title will prevail.”

The question whether the showing made is clear and convincing is one for the trial court.

Hansen v. Bear Film Co., Inc. (supra);

Beeler v. American Trust Co. (1944), 24 Cal. (2d) 1; 147 P. (2d) 583;

Stromerson v. Averill (1943), 22 Cal. (2d) 808; 141 P. (2d) 732.

In *Hansen v. Bear Film Company, Inc.* (supra) at page 173 the court said:

“Although it is necessary, in order to establish a trust, to offer clear and convincing proof, such proof may be indirect, consisting of acts, conduct and circumstances . . . the question whether the showing is clear and convincing is primarily one for the trial court.”

These rules should be strictly applied where, as in this case, appellant comes into court claiming a title

which must necessarily be founded upon evidence showing that it was initiated in fraud in violation and circumvention of the United States Government Freezing Orders and was consummated by perjury through false representation in applications for licenses to the U. S. Treasury Department to which NYK was an acting participant.

The trial court in giving recognition to the above rules stated as follows:

“However, it is axiomatic that to establish a resulting trust, the evidence must be clear and convincing.” (R. 46.)

In applying the rule, the trial court first gave full recognition to appellant’s contention as follows:

“Plaintiff does not dispute the foregoing facts but contends that the requisition of the Tatuta Maru was not a bona fide transaction; that, on the contrary, it was a matter of form only, done to enable the ship to enter and leave American ports without interference from NYK’s American creditors and carried out with the knowledge and approval of the United States Department of State; that NYK in fact furnished the money with which the Japanese Government opened the special account in The Yokohama Specie Bank, Ltd., San Francisco, and was thus the beneficial owner thereof; and that the Attorney General, as successor to the Alien Property Custodian stands in no better position with relation to such accounts than would the Government of Japan.” (R. 45 Memorandum Opinion.)

The learned and able trial judge then proceeded to summarize the nature and extent of the evidence introduced by appellant in support of the facts which appellant claimed gave rise to a resulting trust, as follows:

“To support his position the plaintiff introduced documentary evidence and the deposition of one Seishi Hiroyoshi taken in Tokyo on interrogatories and cross-interrogatories. Much of this evidence was admitted subject to motion to strike on the ground that it was hearsay and no foundation had been laid. The deposition discloses that the witness was employed in NYK’s Tokyo Office several years later. The Court was liberal in admitting such evidence, having in mind that this is an action in equity. In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created. *To find such a trust relationship the Court would have to rely on opinions and conclusions of the witness and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened.*” (Emphasis added.) (R. 46.)

The trial court in weighing the evidence introduced by appellant summarized the factual evidence introduced by appellee, as follows:

“When this evidence is weighed against the undisputed evidence that the Tatuta Maru was operated as a Japanese Government requisitioned

vessel, that NYK and the Government of Japan stated under oath that no one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department to be paid an agency fee for its handling of the ship . . .” (R. 47.)

and the court found that appellant’s evidence “falls short of meeting the ‘clear and convincing’ test necessary to establish a resulting trust”.

In view of NYK’s written admissions under oath made at the time the transaction occurred that it did not have any interest in the bank account, direct or indirect, together with the fact that the legal owner of the bank account represented and warranted under oath that no one other than the legal owner had any interest, direct or indirect, in the bank account, it is respectfully submitted that the trial court did not err in finding that appellant had failed to establish by clear, convincing, unambiguous and satisfactory evidence the necessary elements to establish a resulting trust.

As stated by this court in the case of *Bjornson v. Alaska Steamship Co.* (1951), U. S. Court of Appeals, Ninth Circuit, 193 Fed. (2d) Advance Reports 433: “It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence.” (Citing *U. S. v. Yellow Cab Co.*, 338 U.S. 342; 70 S.Ct. 177; 94 L.Ed. 150.)

II.

**FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS
CLEARLY ERRONEOUS.**

As outlined above and as will be shown in more detail below under Paragraph V of the argument, there was a sharp conflict in the evidence on what was perhaps one of the most crucial issues involved in this action. The trial court resolved the conflict in appellee's favor.

Under these circumstances, the Appellate Court may not set aside on appeal the findings of fact of the trial court unless the appellant affirmatively shows the findings of fact were clearly erroneous.

“Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.”

U. S. Code, Title 28, Sec. 52; Rule 52 R.C.P.:
28 U.S.C.A. Rule 52;

United States v. Yellow Cab Co. (1949), 338
U.S. 338; 94 Lawyer's Ed. 150; 70 Supreme
Ct. 177;

*Japanese Imperial Assurance Co. of New York
v. Supornick & Dunn, Inc.* (1950), 184 F.
(2d) 930.

Appellant has failed to establish any greater grievance than in any case where the evidence would support a conclusion either way, but where the trial court has decided to weigh more heavily for the appellee. Such a choice between two permissible views of the weight of the evidence is not clearly erroneous.

III.

THE TRIAL COURT FOUND AS A FINDING OF FACT UPON CLEAR AND SUBSTANTIAL EVIDENCE THAT NYK DID NOT PROVIDE OR FURNISH THE CONSIDERATION OR MONEY IN THE BALANCE OF SAID BANK ACCOUNT.

Appellant's first alleged assignment of error is that the trial court erred in failing to make a finding on the issue "Did NYK furnish or provide consideration out of which the bank account involved arose?" This alleged assignment of error is untenable.

On August 17, 1951, the trial court rendered and filed its Decision and Opinion. (R. 37-49.) On the same date the trial court made and entered its Findings of Fact and Conclusions of Law, therein finding the facts specially and stating separately its conclusions of law thereon and directing entry of judgment. (R. 49-58.)

It is significant to note that appellant in his argument to support this assigned error does not make any reference whatsoever to the formal Findings of Fact and Conclusions of Law made and entered by the trial court.

It is sufficient if the findings of fact and conclusions of law appear in an Opinion or Memorandum of the trial court, and statements in the trial court's Opinion may be read as a part of the Findings of Fact.

Life Savers Corp. v. Curtiss Candy Co. (1950),
182 F. (2d) 4;

Skelly Oil Co. v. Holloway (1948), 171 F. (2d)
670.

The court is not required to make detailed evidentiary findings.

Norwich Union Indemnity Co. v. Haas (1950),
179 F. (2d) 827.

Nor is it necessary that the trial make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention.

Schilling v. Schwitzer-Cummins Co. (1944), 142
F. (2d) 82.

As stated in *Maher v. Hendrickson*, U. S. Court of Appeals, 7th Circuit (1951), 188 F. (2d) 700:

“The ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and supported by the evidence.”

Woods v. Oak Park Cheateau Corp., 179 F.
(2d) 611;

Shapiro v. Rubens, 166 Fed. (2d) 659;

Life Savers Corp. v. Curtiss Candy Co., 182 F.
(2d) 4.

An examination of the formal Findings of Fact and the Findings of Fact contained in the statement made by the trial court in its Opinion conclusively show that the trial court made a finding on this issue of fact.

The trial court gave full recognition to appellant's claim that the trial presented an issue of fact as to whether NYK did furnish or provide the considera-

tion out of which the bank account involved arose. The trial court said:

“The trial, which was to the Court without a jury, (was) presented two issues for decision, one of fact and one of law, as follows:

I. Did NYK furnish, or provide the consideration out of which the bank account involved arose?

II. Even if it did, was it a transaction to which the courts can give judicial recognition since it was in violation of Federal laws?” (R. 39.)

The trial court in its Opinion then stated:

“These issues arise out of the *following set of facts, as disclosed by the record.*”

The trial court then proceeded to state the facts disclosed in the record which may be summarized as follows:

1. That NYK prior to the freezing controls imposed by Executive Order No. 8832, had operated the steamship vessel “M. S. Tatuta Maru” between the United States and Japan.

2. That NYK had incurred various obligations to American creditors arising out of the operation of its said vessels prior to July 26, 1941, when Executive Order No. 8832 was issued.

3. That efforts of the Japanese Government to have NYK exempted from the freezing order were unsuccessful. Being unsuccessful in exempting NYK from the freezing order, the Japanese Government

requisitioned NYK's "Tatuta Maru" and operated it as a requisitioned vessel.

4. That the Japanese Government, The Yokohama Specie Bank, and NYK were prohibited by the freezing orders from transferring any credit from a bank in Japan to a bank in the United States, and from making any payment to the bank in the United States if the Japanese Government or any Japanese national had any interest, direct or indirect, in such payment, unless such transfer or payment was licensed by the Secretary of the Treasury of the United States.

5. That the Japanese Government applied to the United States Treasury Department for a license to open the bank account involved by receiving a remittance in the sum of \$39,000 from the Japanese Government through The Yokohama Specie Bank, Ltd., Tokyo Office, for deposit in the local bank.

6. That subsequent applications were filed and the Japanese Government in every application made to the United States Treasury Department represented and warranted that no one other than the Japanese Government had any interest, direct or indirect, in the bank account.

7. That NYK in written application to the United States Secretary of Treasury admitted under oath that all receipts and all disbursements concerning the operation of the Japanese requisitioned vessel were independent and had no connection with NYK funds.

8. That the Japanese government authorized NYK to act as its attorney in fact in all matters, business,

operations, and affairs arising out of the operation of the Japanese Government requisitioned vessel.

9. That all transactions concerning said bank account were had under licenses issued by the Treasury Department pursuant to applications made therefor. (R. 39-45.)

The trial court then stated appellant's contention to be as follows:

"That NYK in fact furnished the money with which the Japanese Government opened the Special Account in The Yokohama Specie Bank, Ltd., San Francisco Office, and was thus the beneficial owner thereof." (R. 45.)

The trial court after stating that it was appellant's contention that NYK had furnished the money in the bank account and therefore claimed the beneficial ownership thereof, then stated as a fact that there was questionable evidence indicating that NYK did furnish the money, stating as follows:

"In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created." (R. 46.)

The court had previously pointed out the nature of the evidence submitted by appellant in support of his contention that NYK had in fact furnished the money, and then stated:

"To find such a trust relationship the Court would have to rely on opinions and conclusions

of the witness and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened. When this evidence is weighed against the undisputed evidence that the *Tatuta Maru* was operated as a Japanese Government requisitioned vessel, that NYK and the Government of Japan stated under oath that no one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department, to be paid an agency fee for its handling of the ship, it falls short of meeting the 'clear and convincing' test necessary to establish a resulting trust." (R. 46-47.)

It is respectfully submitted that when the trial court said "To find *such* a trust relationship the court would have to rely on opinions and conclusions . . . it falls short of meeting the 'clear and convincing' test necessary to establish a resulting trust", the court was only referring to the resulting trust claimed by appellant in its contention "that NYK in fact furnished the money with which the Japanese Government opened the Special Account in The Yokohama Specie Bank, San Francisco and was thus the beneficial owner thereof." (R. 45-47.)

It is submitted that the only logical interpretation that can be placed on the foregoing statement of fact made by the trial court in its Opinion is that appellant had offered questionable evidence in support of its contention that NYK had furnished or provided

the money in the bank account and the trial court found as a fact that NYK did not furnish or provide the consideration because the trial court had weighed the evidence opposed to that of appellant on the issue and resolved the conflict of evidence in favor of appellees.

It is of utmost significance that the trial court then went on to add:

“Had plaintiff (appellant) succeeded, however, his position would be no better.” (R. 47.)

This statement of the court can only be interpreted to mean that the court found as a finding of fact that plaintiff had not succeeded in proving or establishing the fact that NYK furnished the money and thus became the beneficial owner of the account.

In the formal Findings of Fact made and entered by the trial court, the court again in Findings I through XIII made the special findings as contained in its Opinion heretofore summarized. (R. 50-55.) The court then made the following specific findings:

“XIV.

That any and all services performed by said NYK concerning the operation of said steamship vessel from the period of October 14, 1941 to and including December 7, 1941 was as an agent on behalf of the Imperial Government of Japan.

XV.

That on November 21, 1941 said NYK was paid the sum of \$4,771.58 by the Imperial Government of Japan for all services rendered by NYK as

agents for the Imperial Government of Japan in the operation of the said vessel by the Imperial Government of Japan for the period from October 14, 1941 to and including November 21, 1941.

XVII.

That the Japanese Government was at all the times during the period of the foresaid transactions the *sole, legal and beneficial owner of the funds* in said account; *that the balance of said account in the sum of \$66,882.15 was never at any time held by the said Yoshio Muto in trust for, or on behalf of, NYK; and that NYK never had any beneficial interest in, or ownership of the said balance of said account.*" (R. 55-56.) (Emphasis.)

The opening of the bank account and all transactions concerned therewith occurred after October 14, 1941. Since the court found specifically that NYK performed any and all services as an agent on behalf of the Imperial Government of Japan, the foregoing findings can only be construed to mean that NYK itself did not provide the consideration. This is especially true in view of the fact that NYK collected over \$66,000 in passage fares as an agent for the Japanese Government for passage on the Japanese Government requisitioned and operated vessel.

In *Frederick v. Baxter Arms Corporation* (1939), 107 F. (2d) 732 plaintiff brought an action to establish a resulting trust as to real properties held by the defendant. It was plaintiff's contention that one Elizabeth Bunge had furnished the consideration for

the taking of the title in defendant's name. As stated by the appellate court "the case therefore turned upon discovering whether Elizabeth or her mother and brother were the beneficial owners of the fund with which Elizabeth originally purchased the property in 1930". Appellant contended that the trial court had erred in failing to make a finding as to whether Elizabeth had furnished the consideration or a portion of the consideration with which the property involved had been purchased, specifically alleging as error the failure of the trial court to make a separate finding as to whether Elizabeth had furnished cash in the sum of \$1,200.00 and also value represented by certain securities. The appellate court in rejecting appellant's alleged assigned error stated as follows:

"We think however that the general finding that the 'fund and securities' in question were not property of Elizabeth, but were the property of her mother and brother, is adequate to include these items (cash and securities) also."

In this case as in the *Frederick* case the trial court found specifically that the Japanese Government was "the sole, legal and beneficial owner of the fund in the bank account", and "that NYK never had any beneficial interest in, or ownership of the said balance of said account", and it is submitted that said findings alone include and embody the unrequired-more-detailed evidentiary finding that NYK did not furnish or provide the consideration represented in the balance of the bank account.

IV.

THE OPINION OF THE TRIAL COURT PROVIDES A CLEAR UNDERSTANDING OF THE BASIS OF THE TRIAL COURT'S DECISION, AND EVEN THE ABSENCE OF A FINDING AS TO WHETHER NYK FURNISHED OR PROVIDED THE CONSIDERATION OR MONEY, WOULD NOT CONSTITUTE REVERSIBLE ERROR.

This case was tried before an able and experienced trial judge. The trial judge before entering judgment rendered a clear, complete and comprehensive written Opinion, setting forth the basis of the trial court's decision. (R. 37-49.) The trial court in its Opinion made a complete and correct appraisal of the evidence and the law to the end that a sound decision has been made and has provided the Appellate Court with a guide to its decision. As shown elsewhere in this brief, the court's decision is supported by the evidence.

Under the above circumstances, this court is bound by the rule recently stated by this court in *Burnham Chemical Co. v. Borax Consolidated* (1948), 9 Cir. 170, F. (2d) 569, Certiorari Denied 69 S.Ct. 655, 336 U.S. 924, Rehearing denied 69 S.Ct. 878, as follows:

“Respecting the failure to make findings where the Opinion of the trial court is before us, see *Hazeltine Corporation v. General Motors Corp.*, 3 Cir. 131, Fed. (2d) 34, 37. The Opinion here provides a clear understanding of the basis of the decision below, and the absence of Findings of Fact and Conclusions of Law is not sufficient to justify a reversal of the case.”

V.

THERE WAS A SUBSTANTIAL CONFLICT IN THE EVIDENCE AS TO WHO PROVIDED OR FURNISHED THE CONSIDERATION OR MONEY REPRESENTED BY THE BALANCE IN THE BANK ACCOUNT.

Appellant's second assigned error is that "the District Court erred in holding that the evidence of appellee (Exhibit F, H, I, J, & K) is contradictory to the resulting trust theory of appellant". (Appellant's Opening Brief page 12.)

Under this assigned error, appellant has stated his position to be as follows:

"It is appellant's position that there is no contradiction in the evidence introduced by appellees and that introduced by appellant." (Appellant's Opening Brief page 13.)

Appellant in his argument in support of this assigned error complains of the fact that the trial court made certain of its findings from evidence introduced by appellant and at the same time rejected and disregarded other portions of the evidence contained in the same document introduced in evidence by appellant. It is submitted that as to those portions of the documents from which the court in its Memorandum and Opinion embodied as conclusively established facts there was no evidence offered by appellees in contradiction thereto, but as to that portion of the same documents which the trial court rejected there was substantial and conclusive evidence in contradiction thereto. Thus it becomes readily apparent that appellant's criticism of the trial court in this regard is completely unjustified.

The only evidence offered by appellant to establish that NYK actually operated the ship and furnished the consideration out of which the bank account arose and that the Japanese Government conceded that the bank account involved belonged to NYK were statements in the form of opinions and conclusions made in correspondence between NYK and the Japanese Government more than one year to seven years after the transaction involved had been completed. They were made at a time when NYK Tokyo was trying to obtain money from the Japanese Government. They were made at a time when the rights of the United States Government had intervened.

After seven years of negotiations between NYK Tokyo and the Japanese Government, during which period the position of NYK was that the Japanese Government was under a duty to forthwith pay the monies advanced by NYK to the Japanese Government without reference to the bank account involved or without any reference to an asserted claim by NYK to the bank account involved, the Japanese Government advised NYK Tokyo of its position, as follows:

“September 6, 1948

To President,

Nippon Yusen Kabushiki Kaisha,

Re: Compensation problem resulting from
Operation of Repatriate Ships executed
Immediately prior to Outbreak of Pacific
War

With reference to the pending problem of compensation of the subject matter, it is understood

that a decision was reached at that time by the Finance Ministry authorities whereby five hundred twenty thousand nine hundred and fifty-nine yen ninety-nine sen paid by you to this Ministry and transmitted to America would be dropped in accordance with the War Indemnity Special Measures Law and frozen funds other than the above would be handled as overseas assets. *Against this decision, petitions were filed by your letters Ei-Gyo-Gai No. 19 of May 31 last year (1947) and Ei-Yu-Gai No. 53 of August 12.* As a result of various negotiations conducted thereafter by this Ministry with the Finance Ministry, an answer has been received as views of the Accountant's Bureau that the aforementioned amount remitted to the U. S. too should not be governed by the War Indemnity Special Measures Law and essentially it should be taken into consideration in connection with the disposition of the overseas assets as part of the balance of the special account of the Consulates in America which is your company's funds. Details are as per the attached letter from the Accountant's Bureau. *This Ministry has no objection to this and should like to appreciate your understanding on the matter.*

Chief of General Affairs Bureau,
Ministry of Foreign Affairs"

(R. 215-216; Emphasis added.)

The only conclusion that can be drawn from the foregoing letter is that the Japanese Government would have no objection to treating the bank account involved as that belonging to NYK. It does not contain an admission by the Japanese Government conceding that the bank account belongs to NYK.

The letter from the Chief Accountant's Bureau to the Chief of the Foreign Affairs Bureau, Ministry of Foreign Affairs referred to in the letter from the Chief of General Affairs Bureau, Ministry of Foreign Affairs to the President of NYK stated in part as follows:

“Re: *Compensation for Losses* resulting from Operation of Repatriate Ships for Japanese Nationals in North American and Southern Region executed immediately prior to Outbreak of Pacific War.

With reference to the above caption, the view of this Bureau is as follows, and we shall appreciate your getting in touch with the Nippon Yusen Kabushiki Kaisha.

I. Concerning North America

1. Nature of the requisition of October 10 for the ‘Tatsuta Maru’, ‘Hikawa Maru’, and ‘Taiyo Maru’.

As documents relating to the said requisition order are untraceable, *it is impossible to draw a clear conclusion as to the nature of this requisition; however, deducing from various circumstances it is believed that in nature the ships were requisitioned ones of the Japanese Government on account of the freezing order of Japanese funds by the United States, but their operation and the relevant accounts were at the responsibility and risk of the Nippon Yusen Kabushiki Kaisha.* The decision made by the Cabinet on September 30 was that: ‘It is expected that there will be almost no loss coming from this navigation, because no cargo will be loaded though passengers are slated

to be booked in full. *Should a loss be incurred by chance the Government will compensate the loss after examination of the actual operation expenditure.*' On the basis of this, Yusen actually received from the Ministry of Communications as subsidy the balance between the necessary expenses for the special navigation of ships for this case, and passenger fares and other revenues, the balance amounting to one million five hundred and forty-two thousand five hundred and five yen seventy-six sen (July 7, 1952). This fact, indeed, testifies to the above views of this Bureau, and it is considered that the operations for this case were to be executed on the account of the Yusen (Nippon Yusen Kabushiki Kaisha). It was only to avoid the freezing of funds that part of the funds was administered as a special accounts of the Consulates.

2. Nature of the Remittances from homeland by Yusen and the Special account of the Consulates.

Whereas the Yusen then had no available funds which were necessary in North America to operate ships owing to the freezing of their funds, as an expedient funds amount to Y520,959.99 were remitted by them to Consulates in America through the means of remittance by the Ministry of Foreign Affairs. *Therefore, it should not be considered, as the side of Yusen asserts, that it advanced the funds that should have necessarily been remitted by the Government.*

Actually the special accounts of the Consulates were monies belonging to Yusen and they only took the form of special consular accounts owing to the Freezing Act.

3. Since the stand of items Nos. 1 and 2 is taken, the amount of Y520,959.99 remitted should be considered as included in the balance of the special accounts of U. S. \$149,192.69 (equivalent to Y636,555.48 in Japanese currency exchanged at the rate 23 7/16 as of December 7, 1941) of the Consulates in America and *should be taken into consideration in connection with the disposition of overseas assets and should not be paid immediately now.*

4. For reference, the Canadian money \$7,218.90 and the U. S. money \$1,000 (31,636.91 yen), which were appropriated to cover the expenses of the Consulate in Vancouver, should be taken into consideration together with the similar cases in the Southern Regions, and this, too, should not be paid immediately now.

II. Concerning Southern Regions.

For this navigation the operation was not executed as a requisitioned ship but in the usual manner by Yusen, and therefore, should be disposed of as an overseas assets. As for the special equipment expenses and demurrage, they cannot be taken into consideration because the Cabinet decision itself concerning the indemnity of losses is not clear." (R. 212-214.)

The above letters typically demonstrate the hearsay opinions on which appellant relied to establish his resulting trust theory. They also demonstrate the conflict in appellant's own evidence concerning the facts on which appellant relies to establish resulting trust.

In addition to the contradiction in evidence shown by appellant's evidence, the following evidence in the

record introduced by appellees was in direct contradiction to appellant's evidence:

1. During the time the bank account was opened, NYK under oath, in writing, admitted that it did not have any interest, direct or indirect, in the proceeds or funds of this bank account. NYK stated and represented in a verified written application that:

"All receipts and all disbursements entered into this operation are independent and bear no connection with the Nippon Yusen Kaisya funds."
(R. 310.)

2. On October 17, 1941, the Imperial Government of Japan gave a written Power of Attorney to NYK to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313.)

3. NYK admitted under oath in writing that the Japanese Imperial Government had requisitioned the M. S. Tatuta Maru and that NYK was merely acting as an agent for the Imperial Government of Japan in the operation of the ship. (R. 309-313.)

4. NYK deposited the passage money collected into the Consul General's account at a time when NYK itself maintained a four figure commercial deposit account in the same bank. (R. 343-344.)

5. The sum of \$66,937.43 collected by NYK for the sale of passage fares and deposited into the account involved was not money or consideration furnished by NYK. This passage money was paid to representatives of the Japanese Government by numerous individuals seeking passage on the Japanese Government requisitioned and operated ship. This money had

never belonged to NYK and never at any time did the American creditors of NYK have the right to look to this money, nor did NYK ever have a right to claim it as its own. As shown above, NYK merely collected the money as agent for the Japanese Government. It was paid to the Imperial Government of Japan by Japanese nationals living in the United States who were anxious to be repatriated to Japan. (R. 94-117.)

6. Not only does the evidence show that this money was collected from individuals in the United States on behalf of the Imperial Government of Japan for passage on the ship operated by the Imperial Government of Japan, but it also showed that NYK received an agency fee for collecting this money on behalf of the Imperial Government of Japan. (R. 332-336, 343-344.)

It is significant that this agency fee was paid by the Japanese Government to NYK on November 21, 1941, more than a month after the bank account involved had been opened and after the proceeds from the sale of tickets had been collected and deposited therein. It is inconceivable that appellant would contend that NYK was at all times the beneficial owner of the fund, and yet receive an agency fee for effecting collection of the fund for the Imperial Government of Japan.

7. No records of NYK made at the time of the transaction involved or otherwise, were produced by appellant to show that NYK was operating the ship or that it was collecting the passage fares in its own behalf.

8. Without a Treasury License as required under the Freezing Order, the transfer money in which NYK had an interest, direct or indirect, to the local bank was impossible. All applications for a license authorizing deposit of money into the bank account involved were in the name of the Imperial Government of Japan by the Japanese Consul. The applications were made to cover only the receipt into the bank account of money belonging solely to the Imperial Government of Japan. All Treasury Licenses issued authorized deposit into the account of money belonging solely to the Imperial Government of Japan. Under these circumstances, the transfer of funds in which NYK had a direct or indirect interest in the bank account could not be made without a license issued by the Treasury Department of the United States. That such funds could not be so transferred is clearly established by the decision of the Supreme Court of the United States in the case of *Propper v. Clark* (1949), 337 U.S. 472.

VI.

THE RECORD CONTAINS CLEAR AND SUBSTANTIAL EVIDENCE
SUSTAINING THE FINDING OF FACT OF THE TRIAL COURT
THAT THE TATUTA MARU WAS A JAPANESE GOVERN-
MENT REQUISITIONED VESSEL.

Appellant in his third assigned error, maintains that:

“... the requisitioning of M. S. Tatuta Maru by the Japanese Government, in accordance with the uncontradictory testimony of the agreement be-

tween the two governments, was a *formality* only, whereby the vessel was able to secure immunity from legal process by American creditors." (Appellant's Opening Brief page 14.)

Appellees do not contend that the Imperial Government of Japan requisitioned *ownership* of the NYK ship. However, the record discloses without contradiction that the Japanese Government requisitioned the use of the NYK ship for the voyage involved, including the proceeds collected for passage on the ship. For the requisitioning of the use and operation of the ship, the Japanese Government agreed to compensate NYK for any loss it might sustain arising out of the Japanese Government's use and operation of the ship.

The necessity for the requisitioning of the use of the ship for the benefit and account of the Japanese Government arose out of the following circumstances:

1. As a result of the monetary freezing orders, NYK had suspended the operation of its ship and services in the United States. (R. 197-198.)

2. Due to the application of the freezing order to Japan and the nationals thereof, over 2000 Japanese nationals were left stranded in the United States. The Japanese Government was anxious to return its nationals to their homeland. Due to the freezing order, NYK was unable to do this for the Japanese Government. In fact, NYK was unable to return its stranded employees. (R. 193-202.)

3. The Japanese Government was unsuccessful in its attempt through negotiations with the United

States to obtain an exemption of NYK from the freezing order. (R. 193-202.)

4. The United States Government informed the Japanese Government that it would be necessary for the Japanese Government to actually requisition the ship with due formality and to make it known to the public that the vessel had so been requisitioned. (R. 199-201.)

On October 14, 1941, the Imperial Government of Japan requisitioned the ship by formally issuing and serving on NYK requisition order No. EN No. 2044. (R. 202-204.) As stated in the requisition order the extent of the requisition of the ship was for the transportation of passengers. In this connection, NYK was to act as an agent on behalf of the Imperial Government of Japan. (R. 203-204.)

The employees of NYK received appointment to the personnel of the Ministry of Communications of the Japanese Government and engaged in the operation of the vessel. (R. 202.) The requisitioning of the vessel was made public in the United States. (Plaintiff's Exhibit 20-E, page 5.) The Imperial Government of Japan gave a written power of attorney to NYK to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313.) NYK received a payment of an agency fee from the Imperial Government of Japan as its commission for the collection of passage and excess baggage and freight fares as an agent for the Japanese Government. (R. 332-336.) On October 14, 1941 the Japanese Government

served upon the American Embassy in Tokyo copies of the requisition order together with copies of the scheduled voyage, embarkation orders to supervisors and the Writ of Appointment of officers of the vessels to the non-official staff of the Ministry of Communications of the Japanese Government. At the same time, the circumstances of dispatch of the requisitioned vessel were telegraphed to the Japanese Ambassador in the United States, and delivered to the Secretary of State of the United States. (R. 202-203.)

It is significant to note that the above evidence clearly establishing requisition of the use and operation of the vessel by the Japanese Government was adduced by the appellant. It is unusual that appellant should ask this court to disregard his own evidence clearly showing the requisition of the vessel by the Japanese Government and ask the court in lieu thereof, to adopt other portions of appellant's own evidence consisting of ambiguous and contradictory statements contained in opinions and conclusions rendered years after the transactions had been closed.

The appellant throughout its opening brief tries to convince the court that it should accept the latter opinions and conclusions contained in his evidence upon the theory that the requisition was a mere formality for the purpose of securing immunity from legal process by American creditors. In view of the fact that *actual requisitioning* of the vessel was required to secure the immunity of legal process desired, appellant's contention that the requisitioning was a mere formality becomes unsound.

It is respectfully submitted that the statements of all parties made at the time the transactions occurred should be accepted rather than the statements made years after the completion of the transaction involved. The statements made at the time of the transaction unequivocally sustain the trial court's finding that the Tatuta Maru was requisitioned and operated in good faith by the Japanese Government.

VII.

APPELLEES CONTEND THAT EVEN IF NYK DID FURNISH OR PROVIDE THE CONSIDERATION OR MONEY REMAINING IN THE BANK ACCOUNT, IT WAS AN ILLEGAL TRANSACTION IN VIOLATION OF FEDERAL LAWS AND CANNOT BE GIVEN JUDICIAL RECOGNITION.

As a general statement of law, when it is shown by clear, convincing, unambiguous evidence that a transfer of property is made to one person, and the consideration therefor is paid by another, a resulting trust is presumed to result in favor of the person by or from whom such payment is made. However, the courts have uniformly refused to apply this general rule where the transaction was one in violation of a Federal statute.

The complaint alleges that the bankrupt NYK endeavored to evade the provisions of the Government Freezing Order, which froze the funds of enemy aliens and prohibited the receipt by the local bank of any money belonging to NYK or in which NYK might

have any interest, without first obtaining a license to do so from the United States Treasury Department.

There is no question but that any plan and scheme of NYK to place its own money in the account involved, would be one in violation of Federal law, prohibited by the Freezing Order. It would have been an illegal act. To accept appellant's theory the entire transaction was one designed to contravene and evade our Federal statutes, and the regulations of the Treasury Department of the United States.

Under these circumstances the law will not impose or create a resulting trust.

The general rule applicable is set forth in 54 *Corpus Juris (Trusts)*, Par. 147, page 372 as follows:

“To raise a resulting trust the transaction must be honest; a resulting trust cannot arise from acts contrary to public policy or a statute nor in favor of the guilty party out of acts which have their origin in a fraudulent purpose, as where a person conveys property to another in fraud of his creditors . . .”

The law of California follows this general rule and is stated in 25 *Cal. Jur. (Trusts)*, Sec. 122, page 259, as follows:

“The trust will not be enforced where it exists by virtue of a contract which is illegal—such, for example, as a contract involving a fraudulent acquisition of public lands. *Again, in a case of a resulting trust, relief will be denied where the evidence shows that the money was paid by the*

plaintiff in furtherance of a scheme to defraud the Defendant.” (Emphasis ours.)

The reason for the rule is that the situation permits of and requires an application of the maxim, “*Ex turpi causa non oritur actio.*”

As stated in *Wise v. Radis*, 74 Cal. App. 765, at page 775:

“No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or *to enforce rights arising out of the illegal transaction.*”

In *Takeuchi v. Schmuck* (1929), 206 Cal. 782, plaintiff paid \$500.00 as a deposit on account of the purchase price for real property. Plaintiff's father, a Japanese alien, had furnished the \$500.00. In addition, plaintiff had paid taxes on the land. Plaintiff brought an action to recover the deposit and taxes paid. Defendant dealt with the father and knew it was against the law for the father to have any beneficial interest in the property. Defendant also knew that it was the father's money. The situation was therefore the same as this case where NYK and the Japanese Government both knew it was against the law to place funds in the local bank without first obtaining a license if NYK had any direct or indirect interest therein. In that case the court said:

“It has long been the rule of law that courts will not compel parties to perform contracts which have for their object the performance of acts

against sound public policy either by decreeing specific performance or awarding damages for breach . . . *This rule is not generally applied to secure justice between parties who have made an illegal contract but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged.* In the instant case the action is not based upon an affirmation of the illegal contract by seeking specific performance or damages for breach, but on an avoidance or rescission thereof, the object of plaintiff being to recover a deposit made and thus restore the status quo. Nevertheless, the parties had conspired to effect a transfer in violation of the provisions of the act and by so doing had rendered themselves amenable to criminal prosecution. The cause of action arises from an illegal transaction. The gravity of the offense is indicated by the severity of the penalty attached, which is imprisonment in the county jail or state penitentiary not exceeding two years or a fine not exceeding \$5,000 or both.”

“It is with much hesitation that we have been brought to the point of holding that the law will not interfere to unloose the grasp of defendants upon the moneys involved in this appeal. While the law will not, upon grounds of public policy, afford relief to either party to an illegal transaction such as this one is shown to be, it is, nevertheless, proper to say that in the forum of good conscience the defendants are not justified in retaining possession of the money in suit. They were conspirators in an attempt to violate the statute in the same sense as were the Japanese father and daughter with whom they dealt, and their con-

duct, because of their citizenship, was more culpable than was the conduct of the ineligible alien or his daughter, who was of alien blood. The law, however, in this class of cases, provides no remedy for either of the offending parties." (Emphasis ours.)

Takeuchi v. Schmuck (supra) at pages 787 and 788.

In *Mitchell v. Cline*, 84 Cal. 409 at pages 415 and 416, the court held:

"The alleged agreements and understandings relied upon by the appellants are contrary to the express provision of the Revised Statutes above quoted, and contrary to the policy of the express laws of the United States regulating the occupation, possession, and sale of the public mineral lands. The avowed purposes of these agreements were, that, by false and fraudulent representations, the parties thereto should obtain from the government the title to about 150 acres of mineral land in violation of express provisions of law, and that they should make an equal division of the land thus obtained among themselves. Now they have succeeded in thus obtaining the land, will a court of equity stoop to investigate and enforce those parts of the agreements and understandings relating to a division of that land among the conspirators? I think not."

Civil Code, Section 1667;

Damrell v. Meyer, 40 Cal. 166;

Huston v. Walker, 47 Cal. 484;

Snow v. Kimmer, 52 Cal. 624.

“The following language of this court in *Beard v. Beard*, 65 Cal. 356, is applicable to this case: The entire transaction between the parties is tainted by fraud, and the plaintiff must content himself with so much of the benefit of it as he has already secured unchallenged. The reason why the common law says such contracts are void is for the public good, and we think that the public good required that this transaction should be held to be void in all its parts. It was a contract which contemplated the perpetration of a fraud upon a court of justice, and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power.

“In the case at bar a fraud upon the government was not only contemplated, but was actually and successfully perpetrated; and the appellants are shown to have ‘secured and unchallenged’ about one-half of the benefits thereof, with which they should content themselves.

“See also *Pomeroy’s Equity Jurisprudence*, Section 401, where, among other things in point here, it is said: Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves.”

In *Moore v. Moore* (1900), 130 Cal. 110, plaintiff brought an action to establish a trust to land, legal

title to which stood in the name of his son. The son in order to obtain title had made false and fraudulent representations in his application to the government for purposes of obtaining a patent title to the land. The son claimed he did this for the plaintiff's benefit and agreed to hold the property for the plaintiff.

“By the allegations of this complaint the son of plaintiff conceived and set in active operation a fraud upon the government of the United States, by which, through flagrant perjury, he undertook to acquire title to a part of the government domain. The plaintiff, knowing this, consented that the fraud should be consummated, upon the assurance that the title acquired should subsequently be conveyed to him. *He seems to think that no one was interested in the scheme other than himself and his son, and that he may be heard to complain in a court of equity because a title thus fraudulently secured from the government by false representations and perjury, to which he was a consenting party, was not afterward conveyed to him. He forgets, however, the higher interest of the general government, and overlooks the dictates of public policy.* That the agreement between the father and son was for the consummation of a fraudulent, imposition upon the government there can be no doubt, and plaintiff's right of recovery under his pleading looks to the enforcement of this illegal contract. As was said by Judge Duncan in *Swan v. Scott*, 11 Serg. & R. 164: The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot estab-

lish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.” (Emphasis ours.)

Moore v. Moore (supra), at pages 112 and 113.

“Ordinarily the parties to a contract, void because contrary to public policy, will be left where they are, when they come to the court for relief.”

Brooks v. Brooks (1944), 63 C.A. (2d) 671 at 676.

“It is well settled that a recovery cannot be had by either party in reliance upon an illegal contract . . . Where a party must disclose an illegal contract to establish his case the action necessarily is contractual in nature.”

Kings Laboratories v. Yucaipa Vol. F. Co. (1936), 18 C.A. (2d) 47 at 48-49.

“More specifically, the court will not aid a party to recover property which has been used by him in violating the laws prohibiting lotteries, or which is designed for that purpose. (Citing cases.) The reasons for refusing the aid of the court become even stronger when the property, by reason of its illegal use, has incurred a forfeiture and is liable to proceedings by the state to ascertain and enforce that forfeiture.”

Nicolli v. McClelland, 21 Cal. App. (2d) 759 at 765.

Appellant, as trustee of the bankrupt, NYK, can assert no greater right than could have been asserted by

NYK. He is chargeable with the fraud and perjury of NYK.

“A trustee in bankruptcy stands in the shoes of the bankrupt, except as against fraudulent conveyance and similar transactions and can assert no greater right against one by whom premises were leased to bankrupt than could have been asserted by the bankrupt in the absence of bankruptcy proceedings.”

Schultz v. England (1939), C.C.A. Cal. 106 F. (2d) 764, 42 Am. Bkr. Rep. N.S. 249.

“A trustee in bankruptcy cannot acquire a greater right or interest in bankrupt’s property than that which belonged to the bankrupt.”

Martin v. New York Life Ins. Co. (1939), C.C.A. Ill, 104 F. (2d) 573, 124 A.L.R. 1163, 40 Am. Bkr. R. N.S. 317, certiorari denied 1940, 60 S. Ct. 123, 308 U.S. 594, 84 L. Ed. 497.

The trustee in this action does not contend that this transaction was a fraudulent transfer or preference within the meaning of the Bankruptcy Act. There is no allegation whatsoever that NYK was insolvent at the time of said alleged transfer or was made insolvent thereby.

To rely on insolvency it must be pleaded and proved.

“Insolvency must be pleaded and proved.”

Duke v. Low (1931), 296 Pac. 45;

In re Clinton Wine & Liquor, 40 Fed. Supp. 106.

It is respectfully submitted that under the law as established by the foregoing decisions this court should not and cannot give any judicial recognition to appellant's claim to the beneficial ownership in the bank account involved.

Appellant concedes that NYK and the Imperial Government of Japan conspired to effect a transfer of funds to the account in the local bank in direct violation of the provisions of the freezing order. As stated by the trial court:

“To recognize the plaintiff's claim would be, in effect, to give judicial approval to an illegal scheme designed to evade the provisions of the freezing order.” (R. 47.)

Since legal title to the bank account stood in the name of Yoshio Muto, appellant cannot escape the fact that the aid of an illegal transaction to avoid the effect of the freezing order is necessary to establish his claim. Under the foregoing decisions, upon it appearing that appellant to establish his case has shown the violation of the freezing order, the court cannot assist him in any manner, whatsoever his claim in justice may be to the bank account involved.

Appellant seeks to avoid the limitations and restrictions imposed by the foregoing decisions, and the decision of the Supreme Court of the United States in the case of *Propper v. Clark* (supra), by urging the court that he is not seeking to have the bank account actually transferred by decree of this court to the appellant. Appellant concedes that unless the trustee

obtains a license from the Treasury Department, this court is without authority to enter a judgment or decree transferring the bank account to appellant. Appellant argues that he is relieved of the limitations and restrictions arising from the foregoing decisions because he is only asking the court to determine in whom beneficial title to the bank account should rest and further states "at this stage of the proceedings the only issue before the court is, who has the greater right to title to the fund, the Alien Property Custodian or the American creditors of NYK". (Appellant's Opening Brief page 30.) Appellant is not so relieved. For this court to judicially recognize appellant's alleged claim of beneficial title to the fund or to determine by judicial decision who is factually entitled to the money in the bank account, would in effect place the stamp of judicial approval upon the fraud, perjury, and conspiracy of NYK and the Japanese Government in evading the provisions of the freezing order. Appellant's distinction in the type of relief he seeks of this court as compared to the relief sought in the foregoing cases is one of form and not of substance. The foregoing decisions have unequivocally established that judicial recognition in any form cannot be given to such illegal, fraudulent, and unlicensed transaction.

Appellant contends that he is seeking a transfer within the framework of the Executive Orders and is not attempting to by-pass the Executive Orders. The fallacy of this contention of appellant lies in the

fact that he is confining the limitations and restrictions of the foregoing decisions to the present transfer he seeks from the Superintendent to the appellant and completely ignores the illegal and fraudulent transfer in violation of the freezing order which gave rise to the bank account. In order that appellant be under no misapprehension as to the unlicensed transfer of which appellees complain, we desire to have it clearly understood that the unlicensed transfer of which we are complaining is the telegraphic transfer of the sum of \$39,000 from The Yokohama Specie Bank, Ltd., Tokyo Office, to the local bank and the deposit in the bank account involved of the passage fares collected upon the representation and warranty that no one other than the Imperial Government of Japan had any direct or indirect interest therein. The licenses granted by the Secretary of Treasury did not authorize the creation or the maintenance of the account if NYK was the beneficial owner of any part of the account. The legal effect of such an unlicensed transaction has been judicially determined by the Supreme Court of the United States in the *Propper* case (*supra*). As held in that decision and as conceded by appellant in his opening brief (Appellant's Opening Brief page 29) this unlicensed transaction is null and void and can confer no right to NYK, through whom appellant's claim arises, which will receive judicial recognition.

CONCLUSION.

NYK, through whom the appellant claims his right to the bank account, was prohibited by the Freezing Order from depositing any money into the account involved herein, without first obtaining a license from the U. S. Treasury Department. To deposit money into a bank account, in which NYK had a beneficial interest, would be in violation of Federal law, punishable by fine and imprisonment. The evidence without contradiction showed that NYK in writing under oath, admitted that it did not have any interest whatsoever in the account involved. The Japanese Government, in writing, under oath, stated that no one other than the Japanese Government had any interest in said bank account. The evidence clearly shows that the Japanese Government placed its own money into the account for the purpose of operating the ship which it had requisitioned from NYK. The Japanese Government applied for and obtained proper licenses from the U. S. Treasury Department to open the account with its own money for the purpose of operating the ship which it had requisitioned. Under these circumstances, the transaction was one in which NYK did not have any beneficial interest. As such, it was a legal and valid transaction and the bank account involved belonged solely to the Imperial Government of Japan.

Appellant's claim to the bank account can only evolve around a transaction initiated in fraud and consummated in perjury. Where the evidence submitted by all of the parties is subject to two different interpretations—one legal and in compliance with the

law, and the other fraudulent, illegal and in circumvention of the Federal law—then that interpretation should be given to the transaction which would make the transaction a legal one and in conformity with the provisions of the Federal law.

Appellant's claim rests solely upon the theory that NYK furnished or provided the consideration for the bank account involved. Appellant failed to establish by clear, convincing and satisfactory evidence that NYK did furnish or provide the consideration for the bank account involved.

Appellant seeks by this action to establish a wind-fall for the American creditors of NYK. Never at any time did the American creditors of NYK have a right to look for payment from moneys or assets of NYK which were owned or found in Japan. NYK should not be permitted to reap any rights to which it was not legally entitled to by reason of the fact that the Imperial Government of Japan deposited in the local bank the sum of \$39,000 by means of a telegraphic transfer from The Yokohama Specie Bank, Ltd., Tokyo Office, to the local bank and the further sum of approximately \$68,000 as proceeds received by the Japanese Government from its operation of the ship involved. There was no evidence adduced showing fraud of any kind having been perpetrated against the American creditors of NYK. In fact, the evidence shows that the United States Government advised the Imperial Government of Japan that it would not permit said Government to defraud the American creditors of NYK. It was by reason of the fact that NYK

had American creditors, that caused the Japanese Government to requisition and operate the ship involved and to deposit the monies belonging to the Imperial Government of Japan into said bank account. The taking over and the operation of the ship by the Imperial Government of Japan cannot be said to be in fraud of American creditors. Under no other circumstances would the United States Government have allowed the ship to make the voyage and have allowed the opening of the bank account.

The bank account is in the name of Yoshio Muto, Counsul General of Japan, but it belongs to the Imperial Government of Japan. It has been vested by the Office of Alien Property. It should be paid to the Office of Alien Property as a vested account.

There is no theory, legal or equitable, under which appellant can recover. For the reasons stated, it is respectfully submitted that judgment of the trial court should be affirmed.

Dated, San Francisco, California,

May 5, 1952.

S. M. SAROYAN,

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Counsel for Appellees,

The Yokohama Specie Bank, Ltd., of San Francisco (a foreign corporation), and Maurice C. Sparling, as Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office.

No. 13,156

IN THE

United States Court of Appeals
For the Ninth Circuit

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt, *Appellant*,
vs.

THE YOKOHAMA SPECIE BANK, LTD., OF SAN FRANCISCO,
a foreign corporation, and MAURICE C. SPARLING, as
Superintendent of Banks of the State of California
and Liquidator of the Yokohama Specie Bank, Ltd.,
San Francisco Office, *Appellees*.

J. HOWARD McGRATH, Attorney General of the United
States, as successor to James E. Markham, former
Alien Property Custodian, *Appellee*,
vs.

(CONSOLIDATED)

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt, *Appellant*.

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt, *Appellant*,
vs.

J. HOWARD McGRATH, Attorney General of the United
States, as successor to James E. Markham, former
Alien Property Custodian, *Appellee*.

Appeal from the Judgment of the United States District Court for
the Northern District of California, Southern Division.

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vs.

(CONSOLIDATED)

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt, *Appellant*.

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt, *Appellant*,
vs.

J. HOWARD McGRATH, Attorney General of the United
States, as successor to James E. Markham, former
Alien Property Custodian, *Appellee*.

**Appeal from the Judgment of the United States District Court for
the Northern District of California, Southern Division.**

**BRIEF FOR APPELLEE J. HOWARD McGRATH,
ATTORNEY GENERAL OF THE UNITED STATES.**

JURISDICTION.

This is an appeal by Sterling Carr, Trustee in
Bankruptcy, from final judgment of the United States

District Court for the Northern District of California, Southern Division, entered August 20, 1951, ordering, adjudging and decreeing that plaintiff take nothing by reason of his complaint or cross-complaint, that defendant Maurice C. Sparling, Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, have judgment against plaintiff for his costs of suit, and that plaintiff in intervention J. Howard McGrath, Attorney General of the United States, have judgment against plaintiff for his costs of suit.

The jurisdiction of the United States District Court was invoked by appellant under the Bankruptcy Act of July 1, 1898, c. 541, §23, 30 Stat. 552; the Act of February 5, 1903, c. 487, §8, 32 Stat. 798; the Act of June 25, 1910, c. 412, §7, 36 Stat. 840; the Act of May 27, 1926, c. 406, §8, 44 Stat. 644; and the Act of June 22, 1938, c. 575, §1, 52 Stat. 854; U.S. Code, Title 11, section 46(b).

The jurisdiction of the United States District Court was invoked by appellee J. Howard McGrath, Attorney General of the United States under the Act of March 3, 1911, 36 Stat. 1091, U.S. Code, Title 28, section 41(1) and under the Act of October 6, 1917, 40 Stat. 425, U.S. Code, Title 50, Appendix, section 17.

Notice of appeal was filed on September 11, 1951 (U.S. Code, Title 28, section 2107, Rule 73, F.R.C.P.).

The jurisdiction of this Court is invoked under U.S. Code, Title 28, section 1291.

The Memorandum Opinion of the District Court is reported in 99 F. Supp. 4.

STATEMENT OF THE CASE.

This is an appeal from the final judgment entered by the District Court for the Northern District of California in a suit in equity, commenced by appellant, Sterling Carr (Trustee in Bankruptcy of the Estate of Nippon Yusen Kaisya, bankrupt) for a declaration that the balance of \$66,884.15 in an account in the name of "Consul General—Yoshio Muto Special Account" is impressed with a trust in favor of the bankrupt (R. 3-11, 70-82). The account is in the Yokohama Specie Bank, Ltd., San Francisco Branch, which is now being liquidated by Maurice C. Sparling, Superintendent of Banks of the State of California, who resists the claim of appellant. The Attorney General of the United States,¹ this appellee, likewise contests the claim, since he has vested the account as the property of the Empire of Japan.²

Nippon Yusen Kaisya (NYK), a Japanese corporation, was engaged in ship transportation prior to World War II, but after the freezing orders (Execu-

¹By Executive Order No. 9788 (October 15, 1946, 11 F.R. 11981) the Attorney General succeeded to the powers and duties of the then Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor, as the context may require.

²While the account stands in the name of Yoshio Muto, the Consul General, it is not disputed that the account is that of the Japanese Government and not the personal account of Muto.

tive Order No. 8389) promulgated by the United States, it no longer sent ships into American ports (R. 197-198). In order to repatriate Japanese nationals from the United States, the Government of Japan requisitioned the NYK ship *Tatuta Maru*, among others (R. 203-204) and gave to NYK a power of attorney to operate that vessel as agent of the government (R. 313). The *Tatuta Maru* came to San Francisco under that requisition. All documents pertaining to this voyage designate the vessel as "Japanese Government Requisitioned Ship" (e.g., R. 96, 97, 105, 107, etc.).

The funds in controversy are the balance remaining in the account standing in the name of the Consul General of Japan. They derive from two sources: (1) \$39,000.00 was deposited in the account from Japan by telegraphic transfer, pursuant to license granted to the Consulate General of Japan (R. 320-322). These funds were to be used to pay the port expenses of the *Tatuta Maru* (R. 321). (2) Subsequent to this initial deposit, sums totaling \$66,811.42 were deposited, representing fares paid by persons sailing on the return trip of the *Tatuta Maru* (R. 102-106, 108-109, 332-336). Withdrawals for payment of the vessel's port expenses were made from this account, leaving the balance involved in this suit. Included in those withdrawals was the payment of an agency fee to NYK for its services in handling the ship in port (R. 343-344).

Inasmuch as this appeal involves questions of fact, the facts will be analyzed further in the argument of this brief.

QUESTIONS PRESENTED.

1. Whether the conclusion of the District Court that the evidence failed to establish the existence of a resulting trust in favor of Nippon Yusen Kaisya is clearly erroneous.

2. Whether, assuming *arguendo* that the evidence did establish the existence of a resulting trust in favor of Nippon Yusen Kaisya, the District Court committed error in holding that it could give no judicial recognition to that beneficial interest.

SUMMARY OF ARGUMENT.

The evidence before the District Court on the question of the existence of a resulting trust was conflicting. Therefore, that court properly held that appellant failed to prove the existence of such a trust by clear and convincing evidence. The weight of the evidence supports the District Court's conclusion that no resulting trust was created. Under these circumstances that court's conclusion that no such trust existed is clearly not erroneous.

Moreover, if it be assumed that the deposits of the funds in the Special Account were made for the benefit of NYK, such deposits were transactions in viola-

tion of federal freezing regulations, because they were not licensed by the Secretary of the Treasury. The District Court therefore properly held that under the principles of law established in *Propper v. Clark*, 337 U.S. 472, it could not give judicial recognition to NYK's claim to a beneficial interest. Appellant's contention that the *Propper* case and the case of *Lyon v. Singer*, 339 U.S. 841, support his view that the District Court should have rendered judgment declaring NYK's beneficial interest, is without merit.

The judgment of the District Court was clearly correct and should be affirmed.

ARGUMENT.

I.

THE DISTRICT COURT'S CONCLUSION THAT NO RESULTING TRUST EXISTED IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND IS CLEARLY NOT ERRONEOUS.

Appellant's case rests on the theory that there existed a resulting trust in favor of NYK with respect to the account in dispute. It is settled that "clear and convincing evidence" is required to establish a resulting trust. *Allen v. Withrow*, 110 U.S. 119-120 (1863); *Johnson v. Umsted*, 64 F. 2d 316, 318 (C.A. 8, 1933); *Hubbard Investment Co. v. Brast*, 59 F. 2d 709, 710 (C.A. 4, 1932); *Bowmaster v. Carol*, 23 F. 2d 825, 828 (C.A. 8, 1928); *Higginbotham v. Boggs*, 234 Fed. 253, 257 (C.A. 4, 1916); *Gomez v. Cecena*, 15 Cal. 2d 363, 366-367, 101 P. 2d 477 (1940); *Helm v. Zaches*, 94 C.A. 2d 625, 628, 211 P. 2d 329 (1949).

The trial court found as a fact that the account was not intended to be held for the benefit of NYK, that the Japanese Government was at all material times the sole legal and beneficial owner of the account, and that NYK never had any beneficial interest in the account (R. 55-56). We believe that finding is supported by the weight of the evidence. Be that as it may, it is not enough that this Court might have reached a contrary result if it had heard the case in the first instance; this Court will not reverse on the facts unless it determines that the findings are clearly erroneous. The Supreme Court has said that a finding is "clearly erroneous" when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395.

The issue on appeal therefore turns on whether on the entire evidence this court is "left with a definite and firm conviction that a mistake has been committed" by the trial court in finding that appellant has failed to show by clear and convincing evidence that the account was to be held for the benefit of NYK.

We think that, taking the evidence as a whole and viewing it in the light most favorable to appellant, the strongest statement that can be made is that its effect is equivocal, and that it is as consistent with an inference that the account belonged to the Japanese Government as it is with an inference that it belonged to NYK. That being so, the party who had

the burden of proof, the appellant, must lose. *Penna. R. Co. v. Chamberlain*, 288 U.S. 333, 339-340.

For example, appellant's chief argument is that the Japanese Government went through the form of requisitioning the *Tatuta Maru* in 1941 because otherwise the American creditors of NYK might have attached her and thus prevented the use of the ship to repatriate Japanese nationals (Appellant's Opening Brief, pp. 14-22). From this start, appellant jumps to the conclusion that the requisitioning was a sham, and that in fact the ship continued to be operated by NYK for its own account and that the bank account set up for purposes of the operation of the ship was the property of NYK. But the purpose of the Japanese Government, the assurance of a method of repatriation, would have been even better served by a genuine requisitioning than by a sham one, and the mere fact that that Government, which had a perfectly legitimate and governmental function to fulfill, chose a method that would be proof against the attacks of creditors is in itself no evidence of fraud; on the facts stated legitimacy is as likely as sham, and there is no presumption of fraud.

There is substantial evidence both among the documents introduced by defendant and among the plaintiff's documents that the Japanese Government is the sole owner of the account.

1. Appellant relies heavily (Appellant's Opening Brief, p. 18) on a lengthy, confidential report of the Bureau of Political Affairs, Ministry of Foreign Affairs, of the Japanese Government, dated December

1942 (Plaintiff's Exhibit 20-E, R. 203-209). The document purports to be no more than its title indicates, namely, an unsworn account made over a year after the events in issue and based on unsworn reports of Japanese Government officials. Quite apart from the competence of this document as evidence, it is equivocal. In point of fact, it shows that at least the Japanese embassy in the United States regarded the funds in the account as government property.

The document states:

It [the embassy] pointed out that there was no alternative but to receive the passage fare in cash or check, if not prepayable in Japan, and deposit the same in the special Consular accounts, and, *later appropriate it to the official Consular expenses* on basis of the agreement between the Governments of Japan and America for the special mutual disposition of Government office expenses and living expenses of members thereof (R. 205-6). (emphasis supplied)

And later in the same document:

Furthermore, as to the balance of the passage money at various North American ports of call, negotiation was under way to have them released from the application of the Monetary Freezing Act in order to use them to defray expenses of offices of the Ministry there. Although the United States Government had an inclination to accept our proposal, before detailed arrangements were made, it became impossible, due to the commencement of the Greater East Asia War (R. 209).

Here, in short, in the words of a document introduced by the appellant is a clear demonstration that the beneficial ownership of the moneys was to be in the Japanese Government. The Japanese Government may have undertaken to compensate NYK for the requisitioning, such compensation to include NYK's actual loss (R. 197), but the existence of such obligation does not create a resulting trust. (Cf. *Restatement of Trusts*, Section 445 (1935)).

2. Plaintiff's Exhibit 20-E also sets forth the order by which the *Tatuta Maru* was requisitioned (R. 203). The propriety of the Japanese Government's decision to take over the ship for a public purpose (the repatriation of Japanese nationals in the United States) is, of course, a diplomatic, rather than a judicial, matter. *The Maipo*, 259 Fed. 367, 368 (S.D.N.Y., 1919). But in any case, the requisitioning was a genuine official act of the Japanese Government as the court below found (R. 56). Appellant, while expressly disavowing in the trial court (R. 158, 159) the conspiracy he alleges in his complaint (R. 6-7), here argues that the entire plan of requisitioning and of opening of the consular account was a sham, that it was not bona fide (Appellant's Opening Brief, pp. 12, 14-22) and that the Secretary of State of the United States was a party to the agreement "to have it appear that the NYK vessels had been requisitioned" (Appellant's Opening Brief, p. 12). As to the United States appellant's intimation of its connivance in an alleged plan to defraud American creditors has no foundation whatsoever. The suggestion seems to be

derived from the following statement in Plaintiff's Exhibit 20-E (R. 199-202) :

However in case the Japanese Government informs this [the United States] Government by formal statement that the three vessels concerned are requisitioned vessels of the said Government, this Government is ready to call the attention of the judicial authorities concerned with reference to the statement of the Japanese Embassy to this department, certifying the requisition of the said vessels, with the object of removing difficulties that may arise by suits against these vessels if suits are filed against the above vessels by civilians (R. 200).

The statement shows simply that the United States, as a matter of international courtesy, was willing to invite the court's attention to the requisitioning should Japan formally advise that such action had taken place. With respect to the act of requisitioning itself, every normal circumstance attendant upon a genuine transaction was present: a formal requisition order was issued and directed to NYK (R. 203-4); representatives of the Japanese Government were placed aboard the vessel to supervise its operations (R. 202); its financial affairs in an American port were placed under the supervision of the government's representative, its Consul; and official notice of the requisitioning was given to the American Government (R. 202).

As reflecting on the genuineness of the requisition, appellant relies strongly (Brief, p. 19) on a report dated August 30, 1948 from Chief Accountant Bureau of Foreign Affairs Ministry to Chief of General Af-

fairs Bureau, Ministry of Foreign Affairs, Japanese Government (R. 212-213). But even assuming the competence as evidence of this hearsay report, seven years after the event, it does not support appellant's position, for the report begins:

As documents relating to the said requisition order are untraceable, it is impossible to draw a clear conclusion as to the nature of this requisition (R. 213).

Appellant further claims, as an "admission" by Japan of the beneficial interest of NYK in the fund (Appellant's Brief 8), certain statements contained in the report of August 30, 1948 and a letter of September 6, 1948 from the Japanese Government to NYK. Apparently NYK by letters of May 13, 1947 and August 12, 1948 (not in evidence but referred to in Exhibit F) had petitioned for reimbursement under the "Japanese War Indemnity Special Measures Law" of sums paid to the Japanese Finance Ministry. The report of August 30, 1948 shows that the balance in the special account involved in this action was included in the amount claimed by NYK, and recommends that the claim be disallowed on the ground that the funds in the Special Account belonged to NYK. The letter of September 6, 1948 notifies NYK of this conclusion and rejects its claim, on the ground that the funds in the consular account (or Special Account) belonged to NYK and that company should have recourse only against that fund.

As an "admission" these documents are of questionable admissibility. Vested property becomes the

property of the United States (*Cummings v. Deutsche Bank*, 300 U.S. 115), and the Japanese Government as a former holder of title had no power to bind the United States. Also, apart from any question as to the competence of these documents as evidence, it is quite apparent that they are entitled to little weight, if any. They reflect merely opinions not reduced to writing until long after the transaction took place, after the outbreak of the war, and at a time when self-interest would dictate the view which the parties would take of the effect of the payment. Thus, as late as 1947 and 1948, when it was apparent to both NYK and the Japanese Government that the loss of the fund would fall on the one which was its owner, we find NYK claiming it belonged to the Japanese Government and the latter that it belonged to NYK. Appellant now in effect asks this Court to reverse the trial judge because he chose to form his own conclusions rather than accept speculative and self-serving opinions formed some seven years after the transaction by agents of the Japanese Government.

The circumstances surrounding the requisitioning were that the Government of Japan urgently needed to repatriate its nationals (R. 194-195), but the NYK would not bring its vessels into American ports because of freezing restrictions (R. 197-198). The *Tatuta Maru* was formally requisitioned (R. 203), and NYK was directed to operate the ship on behalf of the Government (R. 203, 308-9, 313). It is significant, indeed, that NYK was paid an agent's commission as compensation for its services in handling the ship on

behalf of the Japanese Government (R. 332-336, 343-344). Appellant would have us believe that this payment was in furtherance of a scheme to protect the ship from seizure by American creditors (App. Br. p. 21). He overlooks the fact that the ship had long since departed from the American port (R. 74) before the license for this payment was sought (R. 332-336). This agency accounts for all of the circumstances recited in Appellant's Opening Brief, pp. 19-20, showing continued participation by NYK in the operations of the vessel. We can find no basis for appellant's statement, Brief, p. 20) that "NYK sold passage tickets and collected passage moneys for said voyage as principal and did not represent to the public that said passage tickets were sold and passage moneys collected by NYK as the agent of the Japanese Government . . ." The references cited by the appellant all demonstrate that each document pertaining to the voyage in question was stamped "Japanese Government Requisitioned Ship" (e.g., R. 96, 97, 105, 107, etc.).

3. Finally, to be contrasted with the questionable evidence based on opinions formed from one to seven years after the event on which the appellant relies, is the contemporary evidence, most of it in the nature of statements made under oath.

Plaintiffs' Exhibit 22 (R. 258, 315) is an application, No. SF 11630, made to the Secretary of the Treasury for a license to receive a remittance of \$39,000.00 from the Japanese Government for deposit

to the account of Consul General Muto in Yokohama Specie Bank, San Francisco, to be used for the port expenses of the *Tatuta Maru*, described as a Japanese Government requisitioned ship (R. 316). This application represents and warrants that no one other than the applicant (i.e., the Japanese consulate) has any interest, direct or indirect, in the transaction (R. 316). NYK is not mentioned as a party or as having any interest in the fund. This application was granted by License No. SF 11630, October 29, 1941 (Plaintiff's Ex. 23, R. 259, 330).

Plaintiff's Exhibit 29 (R. 317-320) is an application, No. 11631, made October 22, 1941, to the Secretary of the Treasury by Yokohama Specie Bank, San Francisco. It stated that Yokohama Specie Bank, San Francisco had received telegraphic instructions from the bank's Tokyo office, by order of the Japanese Government, to pay the sum of \$39,000 to Consul General Muto in San Francisco, and requested a license to charge Yokohama Specie Bank Japan's account with this amount and credit it to Muto's account. It represented and warranted that no one other than the parties mentioned in the application had any interest, direct or indirect, in the transaction (R. 319). NYK is not mentioned as a party. This application was granted by License No. SF 11631, October 29, 1941 (R. 362-364, 324-325, Plaintiff's Exhibit 27, R. 264).

Defendant's Exhibit D (R. 307-314) is an application, No. SF 11535, made by NYK to the Secretary

of the Treasury on October 22, 1941. It stated that NYK desired a license in order

To handle the Japanese Government requisitioned ship *Tatuta Maru* in the port of San Francisco, due on or about October 30, 1941, as authorized by the power of attorney executed by Yoshio Muto, Consul General of Japan at San Francisco, a notarized true copy of the original thereof is herewith attached.

Such acting will involve assisting in issuing of tickets for passage fares at the San Francisco office and the sub-branch at Los Angeles, and other affairs in connection with the ship's operation.

All receipts and all disbursements incident to this operation are independent and bear no connection with the Nippon Yusen Kaisya funds.

To this application was attached a power of attorney from Muto to NYK reading in part:

Yoshio Muto, Consul General of Japan, San Francisco, California, U.S.A., as official representative of the Imperial Government of Japan, which Government has requisitioned the M.S. *Tatuta Maru*, for its needs and purposes, herewith authorizes Nippon Yusen Kaisya (NYK Line), 500 California Street, San Francisco, a corporation organized and existing under the laws of the Empire of Japan, to act as its attorney in fact in all matters, business, operations, and affairs, arising in connection with the call of the said M.S. *Tatuta Maru* at the Port of San Francisco, October 30, 1941, to November 21, 1941 (R. 313).

The response to this application was a letter dated October 29, 1941, from the Federal Reserve Bank of San Francisco, advising NYK that no action was being taken thereon because the *Tatuta Maru* was to be operated by the Consul General, who had filed an application for a license covering the ship's operations (R. 308-309).

Defendant's Exhibit E (R. 325-327) is an application, No. SF 11537, made October 21, 1941, to the Secretary of the Treasury by the Consulate General of Japan at San Francisco:

to operate the Japanese Government requisitioned ship *Tatuta Maru*, in the port of San Francisco, due on or about October 30, 1941.

It contained the usual representations and warranties as to the parties in interest, and did not name NYK as such a party. It was granted by License No. SF 11537, dated October 29, 1941 (R. 327-328).

Defendant's Exhibits F, G, H and I (R. 328-330) consist of four applications for licenses and the licenses granted in response thereto, bearing Nos. SF 11538, SF 11539, SF 11541, and SF 11540. These applications were made by the Consulate General of Japan at San Francisco to make disbursements from the Special Account for port expenses for the *Tatuta Maru*.

Defendant's Exhibit J (R. 332-334) the application for a license to pay NYK a handling commission and agency fee has already been referred to (*supra*, p. 14). This application was granted by License

No. SF 12971, dated November 19, 1941 (Defendant's Ex. K, R. 334-336).

These documents were evidence, in the form of declarations made under oath by the Japanese Government and NYK, that the following facts were true: first, that the requisitioning by the Japanese Government of the *Tatuta Maru* was a genuine governmental action; second, that no one except the Japanese Government had any interest in the funds deposited in the Special Account; and third, that NYK's position with respect to the operation of the vessel was that of agent for the Japanese Government.

The District Court concluded that on all the evidence before it, a resulting trust was not established. It said (R. 46-47):

. . . it is axiomatic that to establish a resulting trust the evidence must be clear and convincing. In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created. To find such a trust relationship the Court would have to rely on opinions and conclusions of the witness (Hiroyoshi) and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened. When this evidence is weighed against the undisputed evidence that the *Tatuta Maru* was operated as a Japanese Government requisitioned vessel, that NYK and the Government of Japan stated under oath that no

one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department to be paid an agency fee for its handling of the ship, it falls short of meeting the "clear and convincing" test necessary to establish a resulting trust.

The appellant alleges error in the District Court's "failing to make a finding on the issue: 'Did NYK furnish or provide the consideration out of which the bank account involved arose?' " The quotation from the court's opinion just given contains the answer. It declares that "... while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was created." In other words, the evidence as a whole rebuts any presumption that NYK was to retain the beneficial interest in the money, even if it be assumed that the money originally came from that company. Such a presumption is, of course, rebuttable. *Tryon v. Huntoon*, 67 Cal. 325, 7 Pac. 741 (1885); *Gammill v. Nunes*, 104 Ad. Cal. App. 224, 231 P. 2d 86, 87 (1951); *Owings v. Langharn*, 53 Cal. App. 2d 789, 128 P. 2d 114 (1942); *Knouse v. Shubert*, 48 Cal. App. 2d 685, 121 P. 2d 74 (1941); *Elms v. Elms*, 24 Cal. App. 2d 696, 76 P. 2d 126 (1938).

The record abundantly demonstrates the liberality of the trial judge in admitting appellant's evidence and in providing appellant with every opportunity to prove his case. Nevertheless, apart from any ques-

tion as to the admissibility, appellant's evidence has slight probative force. As we have shown, that evidence was at best equivocal. Accordingly, the trial judge was amply justified in finding that appellant did not prove a resulting trust by clear and convincing evidence. What the District Court had before it were the declarations made by the Japanese Government and NYK in 1941, prior to the outbreak of war, and the declarations made by them in 1942 and 1948, after the outbreak of war and the interests of the United States had intervened. It properly held that the earlier declarations made at the time of the events in issue constituted weightier and more reliable testimony. This is, therefore, not a case which on the entire evidence leaves room for a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, *supra*. And see *Grace Bros. v. Commissioner of Internal Revenue*, 173 F. 2d 170, 173-174 (C.A. 9, 1949). The District Court's conclusions in the present case were not only not clearly erroneous, but were fully supported by the weight of the more credible evidence.

II.

THE DISTRICT COURT PROPERLY HELD THAT AS A MATTER OF LAW IT COULD NOT GIVE JUDICIAL RECOGNITION TO APPELLANT'S CLAIM THAT NYK HAD A BENEFICIAL INTEREST IN THE SPECIAL ACCOUNT.

- A. The deposit in the Special Account, if made for the benefit of NYK, was a transaction prohibited by the freezing regulations.

The funds deposited in the Special Account had their sources in two different kinds of financial transactions. The initial deposit of \$39,000.00 had its origin in funds brought into the United States from Japan by means of a telegraphic transfer of a bank credit from YSB Japan to YSB San Francisco. The subsequent deposits, aggregating in excess of \$68,000.00, had their origin in moneys paid by Japanese nationals in the United States as fares for passage on the home voyage of the *Tatuta Maru*. The initial deposit was of money arising out of a transfer of bank credit by YSB Japan, a banking institution outside the United States, to YSB San Francisco, a banking institution within the United States. The subsequent deposits were of moneys already within the United States but paid into the blocked Special Account maintained in YSB San Francisco.

At the time these transactions took place Executive Order No. 8389, as amended July 26, 1941, 6 F.R. 3715, 12 U.S.C.A. §95a note (the pertinent portions of which are set forth in the Appendix, pp. ii-iv), issued by the President, and General License No. 1 as amended June 14, 1941, 6 CFR 2907, Title 31 CFR 1941 Supp. 2682 (the pertinent portions of which are

set forth in the Appendix, pp. iv-v), issued by the Secretary of the Treasury pursuant to powers conferred on him by the President, were in effect. Except as licensed transfers of bank credit between foreign and domestic banks for the benefit of a Japanese national were prohibited by Sec. 1, subparagraph A of the Order, and payments to any domestic bank were prohibited by subparagraph B thereof. In addition, paragraph (ii) (A) of General License No. 1 expressly declared that the general license which it granted authorizing payments into any blocked account in a domestic bank maintained in the name of any blocked national, was not to be construed to authorize payments into such an account if such account was maintained in the name of any one other than the ultimate beneficiary thereof. These provisions prohibited the transfer of credit and all payments into the Special Account unless they were licensed by the Secretary of the Treasury.

As we have already shown, licenses were granted to the Japanese Government, YSB Japan, YSB San Francisco, and the Consul General, acting for the Japanese Government, to effect these transactions. License No. SF 11630 (P's Ex. 23, R. 259, 320), issued to the Consul General, authorized him to receive the \$39,000.00 from the Japanese Government and deposit it in a blocked account in his name in YSB San Francisco. License No. SF 11774 (P's Ex. 28, R. 266, 323), issued to the Consul General, authorized him to receive the \$68,000.00 estimated to result from the operation of the *Tatuta Maru* and to deposit

such income in the same account. There is no question, therefore, that if the only blocked national having an interest in the funds deposited in the Special Account was the Japanese Government, these transactions were duly authorized by these licenses. It is equally clear that if NYK was the beneficial owner of these funds, as appellant contends, these transactions were effected for the benefit of NYK, and in such case NYK would have an indirect interest in the funds, not disclosed to the Secretary of the Treasury at the time the licenses were applied for and issued, and the transactions would be unlicensed and hence prohibited.

There is no doubt, therefore, that if the transactions were effected for the benefit of NYK, they violated the freezing regulations.

B. Propper v. Clark precludes the acquisition of an interest based on a prohibited transaction unless licensed by the federal government.

Of course, if appellant failed to prove that the transactions in question were effected by the Japanese Government for the benefit of NYK and not for its own account, there is no occasion to reach the question whether the acquisition of an interest by NYK in the Special Account was prohibited by Executive Order No. 8389. On appellant's argument, however, at the time that the first deposit was made by the Consul General in the Special Account, a trust in that account resulted then and there in favor of NYK. Consul General Muto received the money as the property of his Government and deposited it as such, so the

acquisition of any interest by NYK must have been the result of a transfer. The District Court held that, under *Propper v. Clark, supra*, it could not recognize any claim of NYK to an interest so acquired.

Appellant argues that in this action he seeks merely a declaration that NYK had the beneficial interest and that he does not seek here payment of the funds on deposit in the Special Account. He seeks to support this argument by citations of the *Propper* case and of *Lyon v. Singer, supra*, as well as by reference to Treasury General Ruling No. 12 (April 21, 1942, 7 F.R. 2991). He contends that under those decisions and the General Ruling he is entitled to litigate the question of the beneficial ownership of the account.

The question here, however, is not the right of appellant to litigate but the effect of the transactions in 1941 and whether by those transactions NYK acquired any interest which our courts will recognize. As we have shown, *supra*, pp. 22-23, no acquisition of any interest by NYK was licensed by the Treasury Department.

The Supreme Court, in *Propper v. Clark, supra*, appears to have settled the law to the effect that:

The language of the order prohibits more than payment. It prohibits transfers of credit. (337 U.S. at 486.)

The effect of the decision in *Lyon v. Singer, supra*, seems to be only that a state court may adjudicate a claim to priority under a state banking law, as long as no transfer of title is involved, for the Court ex-

pressly said that the *Propper* case, in which it held that the Order prevented unlicensed transfers, was not to the contrary. 339 U.S. at 842-843.

The property in question was a debt owed by YSB San Francisco to the Consul General. It was clearly property within the United States and a transfer of any interest therein was within the prohibitions of the Executive Order. It came into existence as the result of deposits made in the Special Account, beginning with the initial deposit of \$39,000 on October 29, 1941, and was maintained thereafter as moneys collected for passage fares on the *Tatuta Maru* were deposited. The resulting trust which appellant claims existed could not have arisen, at the earliest, before October 29, 1941, the date of the initial deposit. On that date, the Executive Order was already in effect. By a formal assignment of its interest, unlicensed, the Japanese Government could not have transferred ownership of the account to NYK. To reach a contrary result in the absence of a transfer would be paradoxical, and would be just as contrary to the purpose of the Executive Order as would recognition of a voluntary and unlicensed transfer.

CONCLUSION.

The judgment of the District Court was correct and should be affirmed.

Dated, May 15, 1952.

Respectfully submitted,

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(Appendix Follows.)

Appendix

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U.S.C. 1 et seq.:

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U.S.C. App. 5:

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign coun-

try or national thereof shall vest, when, as and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . .

2. Executive Order No. 8389, April 10, 1940, 5 F.R. 1400, as amended by Executive Order 8832, July 26, 1941, 6 F.R. 3715:

By virtue of and pursuant to the authority vested in me by section 5(b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, Franklin D. Roosevelt, President of the United States of America, do prescribe the following:

Executive Order No. 8389 of April 10, 1940, as amended, is amended to read as follows:

Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any na-

tional thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. . . .

Sec. 3. The term "foreign country designated in this Order" means a foreign country included

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B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

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E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. . . .

Sec. 3. The term "foreign country designated in this Order" means a foreign country included

in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof the date specified in the following schedule: . . .

(k) June 14, 1941—
China, and Japan; . . .

3. General License No. 1, as amended, June 14, 1941, 5 F.R. 1616, 1695, 2284, 2309, 2593, 6 F.R. 2907:

A general license is hereby granted authorizing any payment or transfer of credit to a blocked account in a domestic bank in the name of any blocked country or national thereof providing the following terms and conditions are complied with:

(1) Such payment or transfer shall not be made:

(a) From any blocked account in a domestic bank; or

(b) From any other blocked account if such payment or transfer represents, directly or indirectly, a transfer of the interest of a blocked country or national thereof to any other country or person.

(2) This general license shall not be deemed to authorize:

(a) Any payment or transfer to any blocked account held in a name other than that of the blocked country or national thereof who is the ultimate beneficiary of such payment or transfer; or

(b) Any foreign exchange transaction including, but not by way of limitation, any trans-

fer of credit, or payment of an obligation, expressed in terms of the currency of any foreign country.

This general license should not be employed to make any payment or transfer of credit comprising an integral part of a transaction which cannot be effected without the subsequent issuance of a further license.

No. 13,156

IN THE

United States
Court of Appeals

For the Ninth Circuit

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt,
vs. *Appellant,*

THE YOKOHAMA SPECIE BANK, LTD., OF SAN FRANCISCO,
a foreign corporation, and MAURICE C. SPARLING, as
Superintendent of Banks of the State of California
and Liquidator of the Yokohama Specie Bank, Ltd.,
San Francisco Office,
Appellees.

J. HOWARD MCGRATH, Attorney General of the United
States, as successor to James E. Markham, former
Alien Property Custodian,
vs. *Appellee,*

(Consolidated)

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt,
Appellant.

STERLING CARR, Trustee of the Estate of Nippon Yusen
Kaisya, a corporation, bankrupt,
vs. *Appellant,*

J. HOWARD MCGRATH, Attorney General of the United
States, as successor to James E. Markham, former
Alien Property Custodian,
Appellee.

Appellant's Reply to Briefs of Appellees

Appeal from the Judgment of the United States District Court for the
Northern District of California, Southern Division.

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vs.

Appellant.

J. HOWARD McGRATH, Attorney General of the United
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Alien Property Custodian,

Appellee.

Appellant's Reply to Briefs of Appellees

Appeal from the Judgment of the United States District Court for the
Northern District of California, Southern Division.

The appellees, Maurice C. Sparling, Liquidator of The
Yokohama Specie Bank, Ltd. of San Francisco, and J.
Howard McGrath, Attorney General, have each individ-

ually submitted a reply brief. With the Court's indulgence we shall answer both briefs in one. In doing so we desire to call the Court's attention that in our opinion there are in appellees' brief many inaccuracies in statements of fact, but we shall refrain from particularizing such instances and shall approach both briefs from the overall standpoint, feeling confident that this Court is fully cognizant of all of the evidence and its implications and inferences.

In both briefs three points are urged: (1) That the evidence is sufficient to sustain the decision of the lower court, (2) that plaintiff is barred by illegality, and (3) the *Propper* case is conclusive on the subject. We shall address ourselves to the above subjects in order.

I.

THAT THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DECISION OF THE LOWER COURT

In support of the position of appellees numerous cases are cited pertaining to the law on appeals. We need not refer to the same and in fact have no criticism of these authorities, but we do protest against the conclusions drawn from the application of law therein to the facts of this case. It has been the position of the trustee in bankruptcy before the lower court that there is no evidence from which the court could come to any conclusion other than that the total consideration was advanced by the NYK and is presently in the Yoshio Muto Special Account; that as a result, under the law of the State of California, a resulting trust is imposed by equity in favor of the individual furnishing the consideration. In this instance the Trustee in bankruptcy herein stands in even a more equitable position than the old NYK. He represents all of the American creditors of

the NYK and is being opposed by the Office of Alien Property solely on the ground that the Office of Alien Property has vested itself of the funds of the Empire of Japan. However, such vesting is subject to any proved and valid claim which impresses a trust in favor of any and all such American claimants against the Empire of Japan, among whom the claimants in this bankruptcy would be included. However, the trustee of the NYK represents a particular group of claimants—creditors of the NYK specifically.

We are intentionally not referring to Maurice C. Sparling, the Liquidator of The Yokohama Specie Bank, the other appellee, because in truth and in fact he is only a stakeholder and thus should have no personal interest in the subject matter.

Before the lower court counsel for appellant constantly urged that the evidence in the case must be viewed from an overall perspective, taking into consideration the background consisting of the imminence of war, the urgency for the repatriation of the Japanese, the desire of the American Government to have the Japanese return to Japan, and the necessity of accomplishing such repatriation with as few legal entanglements in the United States as possible during the course of its execution. Of necessity, in accomplishing this, the requisitioning of the Tatsuta Maru would have to be factual and all of the supporting instruments would have to lend credence to the reality of such plan. For the Court to ignore the underlying plan, to refuse to view evidence presented in the light of the incidents of the year 1941, and to take the position that it will look only to the formal affidavits prescribed by the Treasury Department of the United States as contradictory

to the whole evidence before the Court, particularly at a time when the United States Treasury Department had full knowledge of the reason, the plan, the basis and the method of the repatriation operation, is the grave error of which the trustee in bankruptcy is complaining. We submit that the trial court was in error when it gave any weight to affidavits filed by the NYK or Yoshio Muto as contradictory evidence, particularly when it is obvious that the plan was formulated in accord with diplomatic policy and necessity of the time. In order to carry out the plan it became necessary to have these affidavits in the form in which they were then made. To have the trustee in bankruptcy, who represents American NYK creditors, thwarted in his attempt to secure this money rightfully due the individual creditors of the NYK, as against the Office of Alien Property representing all creditors of the Japanese Government, and which stands in no stronger position than the Japanese Government, is, we submit, indeed an error, and amounts to a travesty of justice towards the creditors of the NYK in the United States.

Counsel for appellant is fully aware that if this Honorable Court refuses to view all of the evidence as a whole, i.e., as part and parcel of one master plan, including the affidavits pertaining to the execution thereof, giving each portion its proper weight and place, we must bow to the authorities which sustain the contention of the appellees.

Incidentally, counsel for both appellees have made great ado about the weakness of the evidence, and we desire to call the Court's attention to the fact that first of all, due to the intervention of the war, it was impossible to secure any evidence until the year 1947 at the earliest. Certainly the

evidence presented as to the negotiations between NYK Tokyo and the Japanese Government in 1942 gives a clear and distinct portrayal of the acts of the parties in 1941 and 1942. It also gives to this Honorable Court the only factual basis upon which the law of the State of California can impose a resulting trust, to wit, actual consideration delivered to the Muto Special Account in the United States by the NYK through the device of the Japanese Government and Consular channels, with NYK receiving no consideration whatever in return. The Trustee herein, as the plaintiff, has come into court asserting legal rights to this fund, not representing the NYK but representing the American creditors of the NYK. We submit that from all of the evidence before this Court, the Court should conclude that the lower court was in error in failing to make a finding, first, that consideration was forthcoming from the NYK; second, that appellant carried the burden of proof and showed a general plan incidental to which money was advanced, which money according to law now is rightfully the property of the creditors of NYK as against general creditors of Japan; third, that the affidavits and applications submitted by appellees must be given no more than their due weight as part and parcel of an overall plan to repatriate Japanese nationals, and not as conclusive admissions against interest by appellant.

We submit that this Honorable Court in considering all of the evidence before it should analyze the same in the same manner as if appellees were the Empire of Japan. In such a case the testimony introduced by appellant, to wit, documents of the Empire of Japan setting forth the arrangement with NYK Tokyo, including all of the plans

and the agreements to repay, would not be adjudged as of such weak character as claimed by counsel, but would be considered as strong and conclusive of the facts. In fact it would be so strong that it should be considered as conclusive admissions against interest of the Empire of Japan, sufficient to deprive the Empire of any standing in such action. In such a proceeding certainly the American creditors would have the right to look to this fund, which arose out of consideration furnished by the NYK in Tokyo and by it delivered to the Empire of Japan for a special purpose. Why appellees should be accorded any greater rights in a resulting trust action, the basis of which is consideration furnished, than creditors who look to such consideration, is a question to which the lower court has been oblivious.

It is necessary in examining this case to strip it of all legal technicalities and complications, for only when that is done can one perceive clearly the true relative positions of the parties involved. Counsel for appellee McGrath urge that the rights of the Office of Alien Property have intervened. What rights have intervened? The only rights that have intervened are the rights of the American creditors of the Empire of Japan, including the NYK creditors. Under Alien Property vesting orders, the Office of Alien Property succeeds only to such rights as the alien had. In this case we submit that the alien Empire of Japan had no right to this fund since it has so admitted in writing on numerous occasions over the period of seven years commencing with 1942. We maintain that there can be no other conclusion than that the lower court has committed error in finding that appellant has not carried the burden of proof.

merely because certain evidence, *contradictory on the surface*, has been admitted. This purported contradictory evidence, if the action were between the two original parties, viz., the NYK and the Empire of Japan, would certainly not be considered as admissions in writing against the moving party. Any such attempt would be completely disposed of by the actual correspondence between the original parties setting forth the whole plan, including the necessity of supplying to the Treasury Department the necessary applications, which in reality are contradictory to the actual facts; that the present trustee in bankruptcy should be met with such a bar and the American creditors thereby be deprived of their rights, is grave error committed by the lower court.

II.

THAT PLAINTIFF IS BARRED BY ILLEGALITY

The second point no doubt will be considered only if the Court is of the opinion that there is merit to appellant's contention that the lower court has committed error in holding that appellant has not convincingly met the test necessary to establish a resulting trust.

Counsel for appellees have urged that the evidence presents a plan where both parties, the Empire of Japan and the NYK, were in *pari delicto* in attempting to bring NYK money into the United States in a manner which would prevent creditors from reaching it. This, they assert, is a fraud and the courts should afford neither party a remedy. Counsel then argue that since appellant stands in the shoes of NYK and the Office of Alien Property stands in the shoes of the Empire of Japan, and since both were in *pari delicto*, the court would not afford its process in aid of such fraud.

The weakness of such conclusion is obvious when we realize that the appellant before the lower court was the trustee in bankruptcy, representing the American creditors of NYK, and one who has the right and the duty to seek such assets of the NYK as can be found within the jurisdiction. In such circumstances a trustee in bankruptcy stands in a much stronger position than his predecessor. In such cases the courts do not *aid* a fraud but in reality *undo* a fraud—in the instant case by making available to the creditors the consideration which is rightfully the funds of the NYK under the California resulting trust law. Accordingly, under elementary law, even if there were illegality in the transaction as claimed by appellees, such illegality would not be a bar to a recovery by a trustee in bankruptcy.

Remington on Bankruptcy, Vol. 2, Div. 8, Sec. 1126

“But they (trustees) do not merely stand in the shoes of the bankrupt. They are vested as to property in the possession of the court with the rights of a creditor holding a lien thereon by legal proceedings, and as to other property with the rights of a judgment creditor holding an execution duly returned unsatisfied.”

The law is generally well settled that the question of *pari delicto* of a defendant (or a predecessor of the trustee in bankruptcy) has no application and cannot be raised against an action of a receiver or a trustee in bankruptcy who represents the creditors and the Court in the administration of the assets. No longer is the bankrupt in existence. The NYK as an entity has vanished. This rule of law is an exception to the ordinary rule and allows the trustee or receiver to attack any transaction as if there were no conspiracy or *pari delicto* relationship existing between the

former parties. Recovery is allowed in favor of the trustee on the basis of public policy.

In

Camerer v. Calif. Savings & Commercial Bank, 4 Cal. 2d, 159, at 170

it is stated:

"It is fundamental that a liquidating receiver represents the interests of depositors and creditors. It is equally fundamental that as a general rule, the receiver takes the insolvent's property subject to all liens, defenses and equities to which it is subject in the hands of the insolvent, and that he administers on behalf of creditors no greater title or estate than the debtor had. (Citing authorities.) *Without denying the validity of this general rule, there are certain situations where the receiver is permitted to assert rights and defenses not available to the insolvent. Thus, it is held that although the insolvent debtor cannot set aside a transfer in fraud of his creditors, as he is in pari delicto, the receiver acting for the creditors may attack it.* (See 23 R.C.L., p. 116, citing cases.) It is also held that although an unrecorded conveyance or mortgage is valid as against the grantor or mortgagor, his receiver prevails over the holder under the unrecorded instrument under statutes which provide that unrecorded transfers are void as to creditors. (Citing authorities.) The justice and equity of such exceptions to the general rule that the receiver has only the rights of the insolvent debtor are apparent." (Italics added.)

Bank of Orland v. Harlan, 188 Cal. 413;

First National Bank of Reedley v. Reed, 198 Cal. 252;

Wood v. Kennedy, 117 Cal. App. 53.

The whole transaction is similar to the class of cases where recoveries are allowed for the return of money where transactions are entered into for the purchase of corporate stock which has been issued without a permit. In those cases, because of public policy, the courts refuse to entertain a defense of illegality of purchase and allow recoveries. The case at bar is in principle identical. Public policy will resist any attempt of appellees to urge *pari delicto*, inasmuch as they can be in no better position than their predecessor the Empire of Japan.

Hansen v. California Bank, 17 Cal. App.2d, 81, at 96;

Kahle v. Stevens, 214 Cal. 89, at 93;

Deane v. Shingle, 98 Cal. 652.

But irrespective of the legal question as to whether the trustee in bankruptcy is subject to the illegality bar, we maintain that no fraud or illegality exists in the case at bar. Certainly, *where no creditors' rights are involved*, a resulting trust cannot arise as between two parties in a situation where both parties are participants in a fraud. But where is there any fraud by anyone in this case? All we find is an agreement between the United States Government and the Japanese Government to conform to all the laws and regulations of the United States; it is an arrangement whereby the NYK is merely an "individual" who supplies the consideration requested by the Empire of Japan, with the understanding that the consideration and the results of such consideration are to remain the property of the NYK. The NYK had no fraud in mind when entering into this agreement to enable its vessels to enter the United States; the NYK had no thought of bringing money into the United States contrary to Treasury Department license provisions.

The arrangement was made between the two governments, and under this arrangement the money was actually brought into the United States under a license in favor of Muto. All of the passenger fares were then deposited in the Muto account under a license. Therefore, up to this point there was no illegality in the transfer of the money to the United States, or in its remaining here in the account of Muto. The money once here legally remains here legally.

Under these circumstances certainly there can be no question of fraud or evasion of any existing laws. Certainly not against the creditors of the NYK. If any fraud was perpetrated, it was perpetrated *against* the creditors of the NYK in the United States, and as to such creditors the Office of Alien Property, standing in the position of the Empire of Japan, would have no right to urge such fraud. Indeed the creditors of the NYK were hindered by the agreed action of both governments in bringing this vessel to the United States. Under these circumstances it is absurd for counsel to present to this Court any contention of fraud or unlawful conduct in an attempt to bar the rights of the American creditors. If anyone should be barred from asserting such a claim, even if there were any basis for it, it would be the Office of Alien Property as successor to the Empire of Japan.

The only legal issue before the Court is the right of the Office of Alien Property standing in the shoes of the Empire of Japan, and the right of appellant, representing the American creditors of NYK, to this particular fund, which came into the United States legally in accordance with all of the licenses, provisions, rules and regulations, and is still here in the possession of the United States under such rules and regulations.

Counsel for appellees on this subject of illegality urge that as a matter of law the District Court may not give judicial recognition to appellant's claim that the NYK had a beneficial interest in the Counsel's Special Account. The obvious error of counsel is in presuming that we claim that the NYK has a beneficial interest, as such term is used, in the funds transferred to the United States in the case at bar and in the proceeds of passage hire deposited to the account in question. Further, the conclusion of illegality is arrived at by assuming that these acts which resulted in the fund, were done primarily for the benefit of the NYK. We emphatically oppose such an original premise and the conclusions which are drawn therefrom. We submit that the NYK funds in trust which we are presently seeking, only became such by the operation of California law, and that the so-called "beneficial trust" held for the NYK and which the trustee is seeking to obtain for NYK creditors, is one which came into being only after an interpretation of all of the acts of the parties; we have never contended that the original parties claim that there is a beneficial trust.

We respectfully submit that a strict application of technical rules based on the camouflage entered into by the Empire of Japan and the NYK and tacitly approved by this government, should not prevent the American creditors from the exercise of their rights based on the true facts, especially where the American creditors of NYK played no part in such camouflage.

THE PROPPER CASE, REPRESENTED AS BEING CONCLUSIVE

Appellant in his opening brief has gone into this subject thoroughly and any lengthy reply to the answer of appellees would be unduly burdening the Court. The distinction between the contentions of appellant and appellees is obvious. Appellant asserts that the *Propper* case gives the Court the right to litigate the rights and liabilities of the trustee in bankruptcy and the Office of Alien Property in connection with the fund in question. Appellees totally disregard this intermediate step and look to the ultimate result of such litigation and contend that if the litigation is successful, there would be a recognition of a transfer of credit.

We do not agree with counsel's statement that we claim at the time the funds were transferred to San Francisco and deposited in the Muto Special Account, the NYK was the beneficiary of an interest in such funds. It is immaterial what the position of the NYK would have been, had no bankruptcy proceeding intervened. Appellant, the trustee in bankruptcy, now asserts a claim based upon the law relative to resulting trusts, including the right to apply to a court for a determination in favor of the creditors of the NYK. That is very far afield from a claim that it was the actual intent of the parties to transfer a beneficial interest along with the funds. The transfer of the funds was legal and was approved by the Treasury Department in favor of the Japanese Consul. Only at the present date we are asking the Court to determine that under California law the creditors of NYK in the United States have a superior right to the funds in question, which legally entered the United States as a licensed transfer.

The recent case of

State of The Netherlands v. Federal Reserve Bank
(1951), 99 Fed. Supp. 655

throws considerable light upon the question of whether the *Propper* case is controlling in all instances. It is an action by State of The Netherlands for recovery of certain bonds which were in possession of the United States Federal Reserve Bank, having been deposited by one Archimedes, an interpleaded defendant, the issue was decided on other phases, but is referred to here because the plaintiff therein urged that the *Propper* case was conclusive as against any transfer to the defendant Archimedes by interpleader. The Court exhaustively considered the recent Supreme Court decisions in *Propper v. Clark*, 1949, 337 U.S. 472; 69 S.Ct. 1333; 93 L.Ed. 1480, and *Lyon v. Singer*, 1950, 339 U.S. 841; 70 S.Ct. 903, 94 L.Ed. 1323, and distinguished them in a manner similar to Appellant's claim of the inapplicability of the *Propper* case to the facts in the case at bar. On page 666 the Court stated in this regard:

"In examining these cases, an explanation of their different results can be found which is also in keeping with the purpose of the regulations in question. In both the Bernstein and Propper cases, the courts had under consideration the extent of interests derived from transactions which were, in themselves, proscribed. In each, the purported transfer, which would give rise to the claim, was illegal. On the other hand, in *Lyon v. Singer* the rights which were validated arose out of transactions not illegal in their inception. In one case a credit was transferred before the freezing order was applicable; in another, a draft was purchased in a foreign country though drawn on and payable by a bank

located in New York. In these instances, it was only the payment of the credits which the federal regulations interdicted and not the underlying transactions that gave rise to the claims. Under such circumstances, the Supreme Court permitted the recognition of the validity of the claims.

“From the reasoning in these cases, it would seem to follow that inasmuch as the actual transaction through which Archimedes asserts his interest was, by law, prohibited, he cannot avail himself of the *Lyon v. Singer* rule. Accordingly, I do not think that he has any valid claim to the bonds. But, in this conclusion, realizing that it emanates from a distinction which the Supreme Court did not itself express, there may be some doubt about it. For this reason, *it is desirable that the applicability of the freezing orders be, at this point, disregarded* so that the nature of Archimedes’ interest in the bonds may be evaluated *as if the monetary regulations do not dispose of the issue.*”

However, as emphatically stated in our opening brief, a decision by this Court in favor of appellant would result in no transfer; appellant concedes that in the event of an affirmative decision it would still be necessary to apply for the consent to transfer the money that is required under Treasury Department licensing regulations. That we are prepared to do. We do take issue with the conclusion that the *Propper* case precludes the right of appellant to litigate the subject matter on the basis that the end result would be a transfer of credit without a proper license having been procured. With a determination by this Court that these funds rightfully belong to the American creditors of the NYK, appellant would be in a position to take the

next logical step, viz., to apply for a license to effect the transfer. Appellant expressly urges that the *Propper* case allows the court to litigate the rights between the parties provided that any transfer of credit must comply with licensing requirements. We emphasize the fact that the Court is only requested to make its finding that appellant has superior rights to these funds; it is fully understood that in the event such finding is made, it would still be impossible for appellant to transfer title to the money unless licensed so to do by the Treasury Department.

In conclusion appellant submits that the judgment of the District Court was in error and should be reversed.

Respectfully submitted,

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